DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1521
Title: KPMG LLP, Petitioner
v.
Robert Cocchi, et al.
Docketed: June 17, 2011
Linked with 10A1027
Lower Ct: District Court of Appeal of Florida, Fourth District
Case Nos.: (4D09-4867, 4D10-988)
Decision Date: December 22, 2010
Rehearing Denied: February 15, 2011

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 18 2011	Application (10A1027) to extend the time to file a petition for a writ of certiorari from May 16, 2011 to June 15, 2011, submitted to Justice Thomas.
Apr 21 2011	Application (10A1027) granted by Justice Thomas extending the time to file until June 15, 2011.
Jun 15 2011	Petition for a writ of certiorari filed. (Response due July 18, 2011)
Jul 15 2011	Waiver of right of respondents Robert Cocchi, et al. to respond filed.
Jul 19 2011	Waiver of right of respondents Rye Select Broad Market Fund, L.P., et al. to respond filed.
Aug 3 2011	DISTRIBUTED for Conference of September 26, 2011.
Aug 11 2011	Response Requested. (Due September 12, 2011)
Sep 12 2011	Brief of respondents Robert Cocchi, et al. in opposition filed.
Sep 27 2011	Reply of petitioner KPMG LLP filed. (Distributed)
Sep 28 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 17 2011	Record Requested.
Oct 24 2011	DISTRIBUTED for Conference of October 28, 2011.
Oct 31 2011	DISTRIBUTED for Conference of November 4, 2011.
Nov 1 2011	Record received from District Court of Appeal State of Florida Fourth District (one box).
Nov 7 2011	Judgment VACATED and case REMANDED. Opinion per curiam. (Detached Opinion)
Dec 9 2011	MANDATE ISSUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KPMG LLP,

Petitioner,

v.

ROBERT COCCHI, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Florida court of appeal's refusal to compel arbitration conflicts with this Court's decisions holding that, under the Federal Arbitration Act, written agreements to arbitrate must be enforced under generally applicable state-law principles even if the result is piecemeal litigation.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are KPMG LLP, Robert Cocchi, Penny Ellen Fromm, PEF Associates, Inc., Brian Gaines, John Johnson, Dr. David Schwartzwald, Rand Schwartzwald, Dr. Herbert Silverberg, John Silverberg, Dr. Jerry Weiss, Donna Weiss, The Norman Shulevitz Foundation, Inc., RM Management, LLC, Sande Wische, Carol Wische, Paula Zitrin, Dr. Jaron Zitrin, Rachel Zitrin, Dr. Roger Zitrin, Tremont Group Holdings, Inc., Tremont Partners, Inc., Rye Select Broad Market Fund, LP, Rye Select Broad Market Prime Fund, LP, and Rye Select Broad Market XL Fund, LP.

RULE 29.6 STATEMENT

Petitioner KPMG LLP has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner KPMG LLP ("KPMG") respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of the State of Florida in this case.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal of the State of Florida is reported at 51 So. 3d 1165 and is reproduced in the Appendix to this Petition ("Pet. App.") at 23a–29a. The court of appeal's order denying rehearing and rehearing en banc is unpublished and is reproduced at Pet. App. 61a. The unreported orders of the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, are reproduced at Pet. App. 1a–22a, 37a–58a, and 59a–60a.

JURISDICTION

The Florida court of appeal entered its final judgment on December 22, 2010. KPMG's timely petition for rehearing and rehearing en banc was denied on February 15, 2011. Pet. App. 61a. Review by the Florida Supreme Court was unavailable because it lacked jurisdiction over the court of appeal's decision. See Fla. Const. art. 5, § 3(b); *Nash* v. *Fla. Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967). On April 21, 2011, Justice Thomas granted KPMG's application to extend the time to file its petition until June 15, 2011. This Court has jurisdiction over the court of appeal's order affirming the denial of KPMG's motion to compel arbitration under 28 U.S.C. § 1257(a). See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 6–8 (1984).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. Section 2 of the FAA provides, in pertinent part, that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

STATEMENT OF THE CASE

The decision of the Florida court of appeal in this case conflicts with this Court's cases and federal circuit cases holding that the Federal Arbitration Act mandates that courts rigorously enforce arbitration agreements under generally applicable state-law principles even if the result is "piecemeal" litigation.

This case arises from the widely reported fraud perpetrated by Bernard Madoff on investors around the country. Plaintiffs in this case are individuals and entities who bought limited partnership interests in one or more of three entities, referred to collectively as the Rye Funds, which invested with Madoff's company, Bernard L. Madoff Investment Securities LLC, and lost substantially all of their value after Madoff's Ponzi scheme was disclosed. This case is one of numerous cases filed in state and federal courts across the country.

As discussed in detail below, KPMG provided audit services to the Rye Funds pursuant to written engagement agreements subject to the FAA. The agreements contain a broadly worded arbitration clause that encompasses the claims that respondents seek to litigate in court. Respondents, who are not

parties to the engagement agreement, nonetheless are bound by the arbitration agreement applicable to the Rye Funds under traditional principles of Delaware state law if, as here, they are suing "derivatively" on behalf of the Rye Funds in which they are limited partners.

Before the Florida court of appeal, KPMG showed that each of respondents' four claims against KPMG was "derivative" under Delaware law and therefore, under the FAA, arbitration should be ordered to resolve each of those claims. Although respondents expressly conceded that they would be bound to arbitrate any claims that were "derivative" of those of the Rye Funds, the Florida court of appeal was equally "candid" that it was "not very sympathetic to binding people who never signed an arbitration agreement to arbitrate." Pet. App. 31a (Oral Arg. Tr. 17). In the ruling under challenge, the court of appeal concluded that two of the four claims against KPMG were "direct," and, on that basis, denied KPMG's right to arbitrate any of the four claims against KPMG "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." *Id.* at 24a–25a.

The court of appeal's decision directly conflicts with this Court's precedents. *First*, under the FAA, a court must compel arbitration of any claim subject to arbitration even if it concludes that one or more other claims are not subject to arbitration. See *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 218–21 (1985) (FAA requires arbitration even if "such a course would result in bifurcated proceedings"). The Florida court of appeal cannot refuse to compel arbitration of one claim because it concludes that another claim is not subject to arbitration. The court of appeal's refusal to compel arbitration conflicts with numerous

decisions by the federal courts of appeals applying this Court's decision in *Dean Witter*.

Second, under the FAA, arbitration agreements are enforceable against "nonparties to the contract" where, as here, "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract." *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896, 1902 (2009); *id.* at 1902 n.5 (court may not "disregard . . . state law *permitting* arbitration by or against nonparties to the written arbitration agreement"). The decision below thus cannot be defended based on a reluctance to compel arbitration against "people who never signed an agreement" because "state law *permit[s]* arbitration . . . against nonparties to the written arbitration agreement." *Id.* at 1902 n.5. The court of appeal's refusal to compel arbitration against nonparties to the agreement conflicts with decisions by the federal courts of appeals holding that nonparties can be compelled to arbitrate under generally applicable principles of state law.

Because the court of appeal's decision is irreconcilable with this Court's decisions in *Dean Witter* and *Arthur Andersen*, KPMG respectfully requests that the Court grant the petition for certiorari, summarily reverse the decision below, and remand for further proceedings not inconsistent with these precedents. See, *e.g.*, *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam) (summarily reversing misapplication of the Court's precedent interpreting the FAA). Alternatively, the Court should grant plenary review.

A. Statutory Framework.

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agree-

ments." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011); see also *Volt Info. Scis., Inc.* v. *Bd. of Trs.*, 489 U.S. 468, 478 (1989). The Act's "central purpose" is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53–54 (1995) (quoting *Volt*, 489 U.S. at 479). Accordingly, courts must "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter*, 470 U.S. at 221; see also *Perry* v. *Thomas*, 482 U.S. 483, 490 (1987).

The Act's centerpiece is § 2, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision "creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts to 'place such agreements upon the same footing as other contracts.'" *Arthur Andersen*, 129 S. Ct. at 1901 (quoting *Volt*. 489 U.S. at 478); see also *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Because judicial hostility to arbitration existed in both federal and state courts, this Court has held repeatedly that § 2 of the FAA applies in both state and federal courts. *Southland*, 465 U.S. at 12–15; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10.

Although the FAA creates substantive federal law mandating enforcement of arbitration agreements, it does not "alter background principles of state

contract law regarding the scope of agreements." *Arthur Andersen*, 129 S. Ct. at 1902. To the contrary, the FAA "retains an external body of [state] law" that "determine[s] which contracts are binding under § 2." *Id.*; see also *Perry*, 482 U.S. at 492 n.9; *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995). Under the FAA, state law may not, however, discriminate against arbitration agreements; it applies only "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 493 n.9; see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (§ 2 "preclude[s] States from singling out arbitration provisions for suspect status").

Background rules of state law govern "the question of who is bound" by an arbitration agreement. *Arthur Andersen*, 129 S. Ct. at 1902. "'[T]raditional principles' of state law allow a contract to be enforced by or against nonparties to the contract" in a variety of circumstances, including through "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Id.* (quoting 21 R. Lord, *Williston on Contracts*, § 57:19, at 183 (4th ed. 2001)). Thus, if an arbitration agreement is enforceable against a nonparty under traditional state-law principles, the FAA requires state and federal courts to enforce the agreement and compel the nonparty to arbitrate. Put another way, the FAA prohibits a court from "disregard[ing] . . . state law permitting arbitration by or against nonparties to the written arbitration agreement." *Id.* at 1902 n.5 (emphasis omitted).

In making that determination, the FAA "manifest[s] a 'liberal federal policy favoring arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone*, 460 U.S. at 24).

Congress recognized that arbitration "'is usually cheaper and faster than litigation,'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No 97-542, at 13 (1982)), and concluded that parties should be free to "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). This Court accordingly has instructed that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25.

B. Factual Background.

As noted above, KPMG served as an outside auditor for the Rye Funds. Compl. ¶ 76. It audited their financial statements pursuant to engagement agreements that contain a broad arbitration clause. The arbitration clause provides, in pertinent part, that arbitration and mediation are the "sole methodologies" for resolving "[a]ny dispute or claim arising out of or relating to the engagement letter" or "the services provided thereunder, or any other services provided by or on behalf of KPMG." Pet. App. 63a, 64a, 68a, 69a. The agreements further provide that "[a]ny issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these procedures . . . shall be governed by the Federal Arbitration Act." *Id.* at 65a–66a, 70a–71a.

Plaintiffs allege that KPMG did not use proper auditing standards when it audited the Rye Funds and as a result failed to uncover Madoff's fraud. Compl. ¶¶ 76–90. Other investors across the country,

including other investors in the Rye Funds, have brought similar claims against KPMG. *E.g.*, *In re Tremont Grp. Holdings, Inc., Sec. Litig.*, MDL No. 2052 (S.D.N.Y. established June 11, 2009). In several of those cases, the plaintiffs either have conceded that their claims must be arbitrated under the engage-ment agreements or have been compelled to arbitrate under the FAA. See, *e.g.*, *In re Tremont Sec. Law, State Law & Ins. Litig.*, No. 08-11183 (S.D.N.Y. Mar. 30, 2010) (Doc. No. 172); *Zutty* v. *Rye Select Broad Mkt. Prime Fund*, No. 09-113209 (N.Y. Sup. Ct. filed Sept. 17, 2009); *Wexler* v. *Tremont Partners, Inc.*, No. 09-101615 (N.Y. Sup. Ct. filed Feb. 5, 2009); *2005 Tomchin Family Charitable Trust* v. *Tremont Partners, Inc.*, No. 09-600332 (N.Y. Sup. Ct. filed Feb. 4, 2009).

C. Proceedings Below.

Plaintiffs filed this suit in May 2009, alleging multiple claims against the Rye Funds and their general partner, as well as four claims against KPMG: (1) negligent misrepresentation, Compl. ¶¶ 128–134; (2) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), *id.* ¶¶ 149–157; (3) professional malpractice, *id.* ¶¶ 158–163; and (4) aiding and abetting a breach of fiduciary duty, *id.* ¶¶ 181–188. Plaintiffs sought recovery against KPMG "for damages as a result of losses of their investment in several partnerships." Pet. App. 24a. All of plaintiffs' claims against KPMG depend on the same basic allegation that KPMG failed to follow appropriate standards in conducting its audits of the Rye Funds' financial statements.[1]

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[1] Compl. ¶ 131 (negligent misrepresentation) (alleging that KPMG did not follow GAAS and GAAP with respect to "the audited financial statements for the Rye Funds"); *id.* ¶ 153

On June 30, 2009, KPMG moved to compel arbitration and stay the action against KPMG or, in the alternative, to dismiss the claims against KPMG on the merits. As to arbitration, KPMG showed that the arbitration agreement was governed by the Federal Arbitration Act. See KPMG LLP's Mem. in Support of Its Mot. to Compel Arbitration and to Stay the Action Against It ("KPMG Mot. to Compel") at 2–4 (Oct. 26, 2009). KPMG further explained that, under the FAA, if there is a valid and binding agreement to which the parties' claims are subject, then "'the Act leaves no place for the exercise of discretion by a . . . court'—the claims must be sent to arbitration." *Id.* at 2 (omission in original). KPMG showed that there were valid arbitration agreements, that the agreements encompassed plaintiffs' claims, and that plaintiffs were bound by the KPMG arbitration agreements with the Rye Funds because plaintiffs were asserting claims that were derivative of claims of the Rye Funds. *Id.* at 2–4.[2]

In response, plaintiffs did not dispute that a valid and binding arbitration agreement existed between KPMG and the Rye Funds. Plaintiffs' Opposition to KPMG's Mot. to Compel Arbitration and to Stay the Action Against KPMG LLP at 3 (Oct. 26, 2009). They did not dispute that the arbitration agreement

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(FDUTPA) (same); *id* ¶ 160 (malpractice) (same); *id.* ¶ 186 (aiding and abetting the breach of fiduciary duty) (alleging that KPMG "knowingly perform[ed] an inadequate audit").

[2] Because the Rye Funds were limited partnerships organized in Delaware, under general principles of Delaware state law, plaintiffs were attempting to step into the Rye Funds' shoes and were subject to the same defenses that KPMG could advance against the Rye Funds. KPMG Mot. to Compel at 3–4 ("Derivative plaintiffs enjoy rights no greater than those of the entity on whose behalf they sue and are bound to any arbitration agreements entered into by that entity.").

encompassed plaintiffs' claims because they arose from audit services performed by KPMG under the engagement agreements. *Id.* at 4–11. Nor did they dispute that they were bound by the arbitration agreement to the extent they were asserting claims derivatively on behalf of the Rye Funds. *Id.* at 6–7. Plaintiffs instead argued that they were not bound by the arbitration agreement because they were not parties to the agreements, and their claims were direct, not derivative. *Id.* at 6–8.

On November 2, 2009, the trial court denied KPMG's motion to compel arbitration without explanation in a one-sentence order. Pet. App. 59a–60a. KPMG immediately appealed under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), authorizing interlocutory appeals of orders determining a party's entitlement to arbitration. See also 9 U.S.C. § 16(a)(1).

On appeal, KPMG argued that the decision whether to compel arbitration was governed by the FAA, under which "'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" Initial Brief of KPMG at 10 (Jan. 15, 2010). KPMG argued that plaintiffs were obligated to arbitrate because (1) there is a valid arbitration agreement, (2) that agreement is binding on plaintiffs, and (3) plaintiffs' claims fall within the scope of that agreement. *Id.* at 8. Where these criteria are satisfied, KPMG further explained that, under the FAA, "the Court's role is severely limited" because "[t]he FAA 'leaves no place for the exercise of discretion by a [court].'" *Id.* at 11 (second alteration in original) (quoting *Dean Witter*, 470 U.S. at 218).

KPMG showed that plaintiffs were bound by the arbitration agreements because their claims depended on injuries suffered by the Rye Funds. *Id.*

at 13. Therefore, "Plaintiffs stand in the shoes of the partnerships" and "are subject to any defenses KPMG LLP could assert against the limited partnerships, including contractual rights to arbitration." *Id.*[3] At oral argument, plaintiffs conceded that "the direct/derivative test of Delaware law applies to determine whether this case is arbitrable under federal law." Pet. App. 34a (Tr. Oral Arg. 31) ("We would concede that yes, Your Honor, that the direct/derivative issue is central to this court's decision.").

On December 22, 2010, the Florida court of appeal affirmed the trial court's order denying KPMG's motion to compel arbitration. Pet. App. 23a–29a. Although KPMG contended that each of plaintiffs' four claims was derivative, and although plaintiffs conceded that any derivative claims were subject to the arbitration agreement, the court of appeal addressed only two of plaintiffs' claims. It ruled that plaintiffs' negligent-misrepresentation and FDUTPA claims were direct claims because plaintiffs alleged "torts directed at the individual limited partners" and that "the limited partners suffered individual harm." *Id.* at 26a. The court of appeal did not address whether plaintiffs' claims for malpractice and aiding

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[3] On February 5, 2010, while KPMG's appeal was pending, the trial court granted KPMG's motion to dismiss in part and denied it in part. Pet. App. 37a–58a. It held that plaintiffs' claims for negligent misrepresentation, malpractice, and aiding and abetting a breach of fiduciary duty were derivative, and dismissed those claims without prejudice and with leave to amend. *Id.* at 43a–44a. Only plaintiffs' FDUTPA claim was ruled to be direct. *Id.* at 45a. The court of appeal granted KPMG's motion to supplement the record on appeal to include the trial court's decision, and, in its reply brief, KPMG advised the court of appeal that the trial court had ruled that "three of Plaintiffs' four claims are derivative." Reply Br. of KPMG at 1 (Apr. 20, 2010).

and abetting the breach of a fiduciary duty were derivative or direct. Instead, the court of appeal affirmed the order denying the motion to compel arbitration as to all four claims "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." *Id.* at 24a–25a.

KPMG petitioned for rehearing and rehearing en banc, contending that the court of appeal had erred by denying arbitration as to all claims. KPMG acknowledged that the Court had concluded that two of the four claims brought by plaintiffs were direct, but argued that plaintiffs should be compelled to arbitrate the remaining two claims that the Court had not ruled to be direct. KPMG's Mot. for Clarification, Rehearing, Rehearing En Banc or Certification at 3–4 (Jan. 6, 2011). KPMG made clear that under the FAA, "'an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.'" *Id.* at 6 (quoting *Moses H. Cone*, 460 U.S. at 20).

Specifically, KPMG explained that if *any* claim is derivative, then that claim is subject to binding arbitration, and the remaining claims must be stayed pending arbitration because all of plaintiffs' claims involve the same issues. *Id.* at 7–8; see 9 U.S.C. § 3; Fla. Stat. § 682.03(3); *Okeelanta Corp.* v. *U.S. Sugar Corp.*, 712 So. 2d 814, 815 (Fla. Dist. Ct. App 1998) (per curiam); *425 Fla., Inc.* v. *George V. Behan Constr., Inc.*, 497 So. 2d 1340, 1341 (Fla. Dist. Ct. App. 1986). In their response, plaintiffs acknowledged that the court of appeal denied arbitration of all claims even though its ruling "was silent" about whether two of plaintiffs' claims "are derivative." Plaintiffs' Response at 3 (Jan. 21, 2011). On February

15, 2011, the court of appeal denied KPMG's petition for rehearing and rehearing en banc without comment. Pet. App. 61a.

Meanwhile, in the trial court, on February 25, 2010, plaintiffs filed an amended complaint, reasserting each of their four previous claims against KPMG—including those ruled by the trial court to be derivative—as well as an additional claim for aiding and abetting fraud. Amended Compl. ¶¶ 135–149, 181–206, 222–239. KPMG again moved to compel arbitration or, in the alternative, to dismiss because plaintiffs were bound by the arbitration agreement as they were asserting derivative claims.

On January 25, 2011, the trial court denied KPMG's motion to compel arbitration, citing its earlier order denying arbitration and the court of appeal's decision affirming that order. Pet. App. 2a (denying motion to compel arbitration because the trial court's previous "order was affirmed by the Fourth District Court of Appeal" and "[t]he arguments presented in the instant motion are nearly identical to the arguments regarding the Engagement Agreement that were presented in KPMG's prior motion"). The court denied KPMG's motion to dismiss the negligent-misrepresentation and professional-malpractice claims, *id.* at 3a–5a, and then dismissed the other three claims without prejudice to amend, *id.* at 5a–10a, 22a.

Plaintiffs have sought leave to amend their complaint to reassert each of their previous claims against KPMG—including those deemed to be derivative by the trial court—as well as an additional claim for fraud in the inducement. See Second Amended Compl. ¶¶ 167–181, 190–204, 236–261, 284–292, 302–310.

REASONS FOR GRANTING THE PETITION

Review should be granted because the decision of the Florida court of appeal conflicts with the decisions of this Court and federal circuit courts mandating that agreements to arbitrate under the FAA must be rigorously enforced even if the result is "'piecemeal'" litigation. See *Dean Witter*, 470 U.S. at 218–21; *Moses H. Cone*, 460 U.S. at 24; *Arthur Andersen*, 129 S. Ct. at 1902.

First, the Florida court of appeal affirmed the denial of KPMG's motion to compel arbitration without ever assessing whether two of the four claims advanced against KPMG were subject to binding arbitration. The court of appeal denied arbitration as to all four claims "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." Pet. App. 24a–25a. That analysis conflicts directly with this Court's ruling that § 2 of the FAA "leaves no place for the exercise of discretion by a district court" and requires that a court "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter*, 470 U.S. at 218, 221; see *Moses H. Cone*, 460 U.S. at 20. Federal courts of appeals throughout the country uniformly have concluded, following *Dean Witter*, that the FAA prevents a court from declining to compel arbitration of claims subject to an arbitration agreement because it deems other claims nonarbitrable. The decision below conflicts directly with these settled principles.

Second, the Florida court of appeal's decision cannot be justified based on the fact that plaintiffs "never signed an agreement to arbitrate." This Court has made clear that the FAA, and its policy favoring arbitration, do not permit a court to "disregard" "state law *permitting* arbitration by or against

nonparties to the written arbitration agreement." *Arthur Andersen*, 129 S. Ct. at 1902 n.5. Here, the Florida court of appeal refused to compel arbitration of any claim advanced against KPMG without ever deciding whether "'traditional principles' of state law allow" KPMG's arbitration agreement to be enforced against plaintiffs as to two of plaintiffs' claims. *Id.* at 1902. By doing so, the court of appeal's decision conflicts with decisions of the federal courts of appeals holding that the FAA requires a determination whether arbitration can be enforced under traditional state-law principles even when a party did not sign the arbitration agreement.

Summary reversal is warranted because the governing principles set forth in this Court's cases are well established, and the decision of the court of appeal contravenes those settled standards as to an important and recurring issue of federal law. Alternatively, the Court should grant plenary review because the decision of the Florida court of appeal conflicts directly with decisions of this Court and multiple federal appellate courts on an issue that has arisen, and will continue to arise, regarding the proper rules governing the resolution of litigants' efforts to compel arbitration under the FAA.

I. THE DECISION BELOW DISREGARDS THIS COURT'S PRECEDENTS MANDATING RIGOROUS ENFORCEMENT OF ARBITRATION AGREEMENTS UNDER THE FAA.

The decision of the Florida court of appeal in this case is contrary to this Court's settled precedents requiring state courts to enforce arbitration agreements under the FAA.

Under the FAA, arbitration must be compelled when (1) there is a written agreement to arbitrate, (2) the agreement is broad enough to encompass the subject matter of the dispute between the parties, and (3) the agreement is binding on the parties. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). Here, plaintiffs did not and could not contend that the KPMG arbitration agreement is invalid, and there was no dispute that, by its terms, the arbitration agreement encompasses the subject matter of the dispute between plaintiffs and KPMG. Further, as to the final question—whether the agreement is binding on plaintiffs—there was no dispute that plaintiffs are bound by the arbitration agreement to the extent they are suing derivatively on behalf of the Rye Funds rather than directly on their own behalf. Against this background, the court of appeal denied arbitration of all four claims against KPMG based on its conclusion that two of the claims were "direct" claims to which the KPMG arbitration agreement "would not apply." Pet. App. 24a–25a. By doing so, the court disregarded this Court's precedents under the FAA.

As plaintiffs have acknowledged, the court of appeal's decision "was silent" about whether plaintiffs' malpractice and aiding and abetting a breach of fiduciary duty claims "are derivative." Plaintiffs' Response at 3. The court's refusal to compel arbitration of any claim against KPMG can be explained in one of two ways. *First*, the court of appeal concluded that it was unnecessary to decide whether plaintiffs' malpractice and aiding-and-abetting claims were derivative because the presence of two claims it deemed not subject to arbitration authorized the denial of arbitration as to *all* claims against KPMG. *Second*, the court of appeal concluded

that plaintiffs' malpractice and aiding-and-abetting claims were derivative, but nonetheless refused to compel arbitration of those claims because plaintiffs never signed an agreement to arbitrate. Either way, the court's decision violates this Court's precedents and should be reversed.

1. Under the FAA, if any claim is subject to binding arbitration, a court must compel arbitration of that claim even if the suit involves other claims or parties not subject to arbitration. The controlling decision is *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985). There, an investor sued his broker-dealer, Dean Witter, alleging violations of both the federal securities laws and various state-law provisions. Pursuant to the parties' arbitration agreement, Dean Witter moved to compel arbitration, but only with respect to the state-law claims, because it was assumed the federal securities claims were nonarbitrable under *Wilko* v. *Swan*, 346 U.S. 427 (1953). The district court refused to compel arbitration, concluding that "[w]hen arbitrable and non-arbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court . . . may in its discretion deny arbitration as to the arbitrable claims and try all the claims together." *Dean Witter*, 470 U.S. at 216.

This Court unanimously rejected that view, holding that the FAA "requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217. Emphasizing the FAA's mandatory and unequivocal language, and Congress's purpose "to ensure judicial enforcement of privately made agreements to arbitrate," this Court concluded that "a

court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made," "even if the result is 'piecemeal' litigation." *Id.* at 218–21.

Dean Witter thus squarely forecloses any contention that the presence of nonarbitrable direct claims permitted the court to refuse to enforce the arbitration agreement with respect to arbitrable derivative claims. Even accepting the court of appeal's decision as to plaintiffs' negligent-misrepresentation and FDUTPA claims,[4] the court's refusal to compel arbitration of the remaining claims against KPMG conflicts with this Court's governing precedent. Under *Dean Witter*, a court may not refuse to compel arbitration of claims subject to a binding arbitration agreement on the ground that other claims before the court are nonarbitrable.

In this respect, the decision below also conflicts with a series of decisions by the federal circuit courts that make clear that the FAA requires courts to compel arbitration of arbitrable claims even if they are presented in a lawsuit that raises other claims that are not arbitrable. For example, the Fourth Circuit has held, based on *Dean Witter*, that "the fact that the matters to be arbitrated may be 'intertwined factually and legally' with the matters to be decided by the district court no longer presents an obstacle to arbitration of the arbitrable matters." *Summer Rain* v. *Donning Co./Publishers, Inc.*, 964 F.2d 1455, 1460 (4th Cir. 1992). Similarly, the Fifth Circuit has held that "where a valid arbitration agreement exists, a

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[4] In reality, *all* of plaintiffs' claims are derivative and hence subject to binding arbitration. The court of appeal erred in reaching a contrary conclusion with respect to plaintiffs' negligent-misrepresentation and FDUTPA claims.

district court must compel arbitration despite intertwining with non-arbitrable claims." *Bhatia* v. *Johnston*, 818 F.2d 418, 420 (5th Cir. 1987). More recently, the Second Circuit has reconfirmed that "the Supreme Court has made clear that the Arbitration Act requires district courts to compel arbitration of arbitrable claims even where doing so produces the inefficiencies associated with litigating similar claims in separate proceedings in different forums." *White* v. *Cantor Fitzgerald, L.P.*, 393 F. App'x 804, 807–08 (2d Cir. 2010); see also *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 934 (10th Cir. 2001) (stating that "district courts must compel arbitration even if arbitrable and nonarbitrable claims are pleaded in the same complaint despite the potential negative effects on efficient dispute resolution").

The decision of the Florida court of appeal refusing to compel arbitration of any of plaintiffs' four claims against KPMG because it concluded that two of those claims are not arbitrable cannot be reconciled with the decision of this Court in *Dean Witter* or the holdings of federal circuit courts that have followed *Dean Witter*.

2. To the extent the Florida court of appeal concluded that plaintiffs' malpractice and aiding-and-abetting claims were derivative, but refused to compel arbitration because plaintiffs had not signed the KPMG arbitration agreement, the court likewise clearly erred in refusing to compel arbitration of those claims.

This Court's precedents hold that, under the FAA, courts must "rigorously enforce" arbitration agreements according to their terms. *Dean Witter*, 470 U.S. at 221. As noted, this substantive requirement of federal law arises from § 2 of the FAA and "is equally

binding on state and federal courts." *Vaden* v. *Discover Bank*, 129 S. Ct. 1262, 1271 (2009). Further, as this Court has explained, nonparties may be compelled to arbitrate under the FAA where "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract." *Arthur Andersen*, 129 S. Ct. at 1902; see generally 1 Larry E. Edmonson, *Domke on Commercial Arbitration* ch. 13 (3d ed. 2010) (same); 1 Thomas H. Oehmke, *Oehmke Commercial Arbitration* ch. 9 (3d ed. 2011) (same).

In *Arthur Andersen*, this Court addressed the Sixth Circuit's determination that "those who are not parties to a written arbitration agreement are categorically ineligible for relief," including enforcement under § 2 of the FAA. 129 S. Ct. at 1901. This Court explained that state law is "applicable to determine whether contracts are binding under § 2" "'*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Id.* at 1902 (alteration omitted) (quoting *Perry*, 482 U.S. at 493 n.9). As a result, this Court rejected the view that "nonparties to a contract are categorically barred from relief' under the FAA because "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract." *Id.* (quoting 21 Lord, *supra*, § 57:19, at 183). The Court further explained that the FAA does not permit a court to "disregard . . . state law *permitting* arbitration by or against nonparties to the written arbitration agreement." *Id.* at 1902 n.5.

Here, the relevant rule of state law is the familiar principle that a party suing derivatively on behalf of a third-party stands in the third-party's shoes and is subject to any defense that could be raised against the third-party if it brought the claim itself. See, *e.g.*,

Schleiff v. *Balt. & Ohio R.R.*, 130 A.2d 321, 327 (Del. Ch. 1955).[5] Under Delaware law, a party asserting derivative claims on behalf of an entity is bound by the entity's arbitration agreement. See, *e.g.*, *Ernst & Young Ltd.* v. *Quinn*, No. 09-1164, 2009 U.S. Dist. LEXIS 99835, at *24–28 (D. Conn. Oct. 26, 2009) (applying Delaware law); *In re Salomon Inc. Shareholders' Derivative Litig.*, No. 91-5500, 1994 U.S. Dist. LEXIS 1374, at 12–14 (S.D.N.Y. Sept. 28, 1994) (same).

None of these governing principles was disputed by the parties in the proceedings below. Rather, both parties agreed that the dispositive question was whether plaintiffs' claims are derivative or direct under Delaware law. See Pet. App. 34a (Tr. Oral Arg. 31) ("THE COURT: You can see [*sic*] that the direct/derivative test of Delaware law applies to determine whether this case is arbitrable under federal law? [PLAINTIFFS' COUNSEL]: We would concede that, yes . . . ."). For its part, the court of appeal, applying Delaware law, concluded that plaintiffs' negligent-misrepresentation and FDUTPA claims were direct and thus not subject to the arbitration agreement. *Id.* at 26a (applying the test set forth in *Tooley* v. *Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)). Inexplicably, however, the court of appeal failed to address plaintiffs' claims for malpractice and aiding and abetting a breach of fiduciary duty, even though the court recognized that KPMG sought to compel arbitration of these claims as well. *Id.*

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[5] Because the Rye Funds are Delaware entities, Compl. ¶¶ 21–23, it was undisputed that Delaware law governs this issue, see *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108–09 (1991).

To the extent the court declined to compel arbitration as to the latter two claims, even though it concluded that they were derivative, the court violated this Court's clear precedent in refusing to compel arbitration of these claims. If plaintiffs' claims are derivative under Delaware law, then the FAA denies the Florida court of appeal any discretion to "disregard" "state law *permitting* arbitration against nonparties to the written arbitration agreement." *Arthur Andersen*, 129 S. Ct. at 1902 n.5.

On this issue as well, the court's refusal to compel arbitration as to plaintiffs' professional-malpractice and aiding-and-abetting claims against KPMG conflicts with decisions of the federal circuit courts holding that arbitration under the FAA must be compelled against "nonparties to the contract" if warranted under "'traditional principles' of state law." *Id.* For example, the Fifth Circuit has held that "nonsignatories to arbitration agreements . . . may sometimes be compelled to arbitrate." *Todd* v. *S.S. Mut. Underwriting Ass'n (Berm.) Ltd.*, 601 F.3d 329, 333 (5th Cir. 2010); see also *Wash. Mut. Fin. Grp., LLC* v. *Bailey*, 364 F.3d 260, 267 (5th Cir. 2004) (holding that a nonparty may be "bound to the terms of the arbitration agreement" "under ordinary principles of contract law"). Likewise, the Ninth Circuit has concluded that "contract and agency principles [may] bind nonsignatories to arbitration agreements." *Comer* v. *Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006). Similarly, the Sixth Circuit has held that "nonsignatories may be bound to an arbitration agreement under ordinary contract and agency principles." *Javitch* v. *First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003) (vacating and remanding district court's decision refusing to compel arbitration); *cf. Zurich Am. Ins. Co.* v. *Watts Indus.*,

Inc., 417 F.3d 682, 687 (7th Cir. 2005) (recognizing a variety of state-law "doctrines through which a non-signatory can be bound by arbitration agreements entered into by others").

The decision below cannot be defended on the ground that plaintiffs were not parties to the KPMG arbitration agreement because this Court's decision in *Arthur Andersen* and federal circuit decisions hold that nonsignatories may be bound to arbitration agreements under generally applicable state-law principles.

II. THE COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

In light of the direct conflict between the decision below and this Court's and federal circuit court precedents under the FAA, KPMG respectfully requests that the Court grant the petition for certiorari, summarily reverse the decision below, and remand the case for further proceedings not inconsistent with this Court's precedents. Alternatively, the Court should accept the case for plenary review.

Although summary reversal is strong medicine, it is appropriate where, as here, "'the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" Eugene Gressman et al., *Supreme Court Practice* 350 (9th ed. 2007) (quoting *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); see *id.* at 352 ("the Court has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous"). Aside from the clear conflict between the decision below and this Court's precedents, a number of additional considerations warrant summary reversal in this case.

First, as this Court has explained, "state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden*, 129 S. Ct. at 1272. That is because the FAA "is something of an anomaly in the realm of federal legislation": Although it creates substantive federal law, it "bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties' dispute." *Id.* at 1271 (internal quotation marks and alterations omitted). As a result, when the underlying dispute does not give rise to federal jurisdiction, a party seeking to enforce an arbitration agreement must rely on state courts to enforce its federal rights under the FAA. When the state courts refuse to do so, only this Court can provide redress. Accordingly, this Court has not hesitated to step in when state courts have improperly refused to compel arbitration under the FAA. See, *e.g.*, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 449 (2006) (reversing state-court decision and reaffirming FAA precedent from this Court); *Citizens Bank*, 539 U.S. at 56 (summarily reversing state-court decision that misapplied precedent from this Court to "limit . . . the FAA's reach").

Second, the decision below reflects the kind of judicial hostility to arbitration the FAA was designed to eliminate. Plaintiffs conceded below that any derivative claims were subject to binding arbitration. Pet. App. 34a (Tr. Oral Arg. 31). The trial court summarily refused to compel arbitration, even though it held that three of plaintiffs' four claims were derivative. *Id.* at 43a–45a. The court of appeal affirmed that order, without addressing whether two of plaintiffs' claims were derivative, and did so in a manner that leaves serious doubt about the court's willingness to enforce arbitration agreements against

nonparties even where mandated under the FAA. See *id.* at 31a (Tr. Oral Arg. 17) (THE COURT: "I'm going to be candid with you . . . I'm not very sympathetic to binding people who never signed an arbitration agreement to arbitrate."). This Court's precedents make clear that the FAA requires courts to enforce arbitration agreements against nonparties when the contract is enforceable against nonparties under traditional principles of state law. *Arthur Andersen*, 129 S. Ct. at 1902. The Florida courts are not at liberty to disregard that binding precedent based on their own views of the propriety of enforcing arbitration agreements against nonparties. Cf. *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 511 (2001) (per curiam) (summarily reversing where court improperly refused to defer to arbitrator's decision in violation of this Court's precedents).

Third, the decision below subjects KPMG to inconsistent obligations because other courts have ruled that KPMG's arbitration agreement is enforceable under the FAA against claims brought by limited partners that are materially indistinguishable from the claims advanced by plaintiffs here. *E.g.*, *In re Tremont Secs. Law, State Law & Ins. Litig.*, No. 08-11183 (S.D.N.Y. Mar. 30, 2010) (Doc. No. 172). Thus, on the one hand, multiple district courts have already enforced KPMG's right to arbitrate similar claims under the FAA. The Florida court of appeal, however, in the decision below, has forced KPMG to litigate in court similar claims that are subject to arbitration elsewhere.

Finally, the decision below undermines Congress's intent in enacting the FAA and sanctions an ongoing violation of KPMG's federal rights. The FAA reflects a strong "statutory policy of rapid and unobstructed

enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23. Because a "prime objective [of arbitration] is to achieve 'streamlined proceedings and expeditious results,'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008), Congress instructed the courts "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone*, 460 U.S. at 22.[6]

Yet, despite a binding arbitration agreement, this dispute has been in litigation now for more than two years, with no end in sight. Plaintiffs have amended their complaint to reassert claims previously held to be derivative, and are seeking another further amendment to reassert derivative claims subject to binding arbitration. The trial court has refused to compel arbitration on the ground that its prior determination was affirmed by the Florida court of appeal. Put simply, the decision below denies KPMG the benefit of its arbitration agreement, contrary to federal law. See *Hall Street Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576, 588 (2008) (the FAA creates "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway").

This Court should grant the petition, summarily reverse the court of appeal's ruling, and put an end to the violation of KPMG's rights under the FAA.

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[6] *See also Mitsubishi*, 473 U.S. at 633 ("it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies"); *Southland*, 465 U.S. at 7 ("Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.").

CONCLUSION

For these reasons, the Court should grant the petition for certiorari and summarily reverse the decision below, or alternatively, the Court should accept the case for plenary review.

Respectfully submitted,

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June 15, 2011

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA016230XXXXMB
CIVIL DIVISION: "AD"

ROBERT COCCHI, PENNY ELLEN FROMM, PEF ASSOCIATES, INC., BRIAN GAINES, JOHN JOHNSON, DR. DAVID SCHWARTZWALD, DR. HERBERT SILVERBERG, DR. JERRY WEISS, DONNA WEISS, THE NORMAN SCHULEVITZ FOUNDATION, INC., RM MANAGEMENT, LLC, SANDE WISCHE, CAROL WISCHE, PAULA ZITRIN, DR. JARON ZITRIN, RACHEL ZITRIN, AND DR. ROGER ZITRIN,

Plaintiffs,

v.

TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS, INC., RYE SELECT BROAD MARKET FUND, LP, RYE SELECT BROAD MARKET PRIME FUND, LP, RYE SELECT BROAD MARKET XL FUND, LP, AND KPMG, LLP

Defendants.

ORDER DENYING KPMG'S MOTION TO COMPEL ARBITRATION: GRANTING IN PART AND DENYING IN PART KPMG'S MOTION TO DISMISS; & GRANTING IN PART AND DENYING IN PART TREMONT & RYE DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

THIS CAUSE having come before the Court upon the Motion to Compel Arbitration of Claims in the

Amended Complaint and, Alternatively to Dismiss, filed by Defendant KPMG, LLP; and the Motion to Dismiss the Amended Complaint, filed by Defendants Tremont Group Holdings, Inc, ("TGH") and Tremont Partners, Inc. ("TPI") (together, the "Tremont Defendants") and joined by Defendants Rye Select Broad Market Fund, L.P., Rye Select Broad Market Prime Fund, L.P., and Rye Select Broad Market XL Fund, L.P. (together the "Rye Defendants"). Having reviewed the motions and applicable law, having heard argument of counsel, and being otherwise fully advised in the premises, the Court finds as follows:

Defendant KPMG LLP's Motion To Compel Arbitration

KPMG moves to compel arbitration of all claims in the Amended Complaint. The Court previously denied KPMG's motion to compel arbitration that was originally filed June 30, 2009. That order was affirmed by the Fourth District Court of Appeal. *KPMG, LLP v Cocchi,* 2010 WL 5174020 (Fla. 4th DCA 2010). The arguments presented in the instant motion are nearly identical to the arguments regarding the Engagement Agreement that were presented in KPMG's prior motion. Accordingly, the motion is likewise denied.

Defendant KPMG LLP's Motion To Dismiss

Standard Of Review On Motion To Dismiss

A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations of the complaint must be taken as true and all reasonable inferences construed in favor of the nonmoving party. *Fla. Bar v. Greene,* 926 So. 2d 1195, 1199 (Fla. 2006). To state a cause of

action a complaint must allege sufficient facts to show that the pleader is entitled to relief. *Equity Premium, Inc. v. Twin City Fire Ins. Co.*, 956 So. 2d 1257, 1259 (Fla. 4th DCA 2007). When considering the merits of a motion to dismiss, a court is limited to the four corners of the complaint. *Id.* (Except when analyzing personal jurisdiction, venue, forum non-conveniens, and sufficiency of service of process where affidavits can be considered. *See Mancher v. Seminole Tribe of Florida*, 708 So. 2d 327, 328 (Fla. 4th DCA 1998)).

The Amended Complaint contains five counts against Defendant KPMG: negligent misrepresentation (Count V); violation of Florida's Deceptive and Unfair Trade Practices Act (Count IX); professional malpractice (Count X); aiding and abetting breach of fiduciary duty (Count XIII); and aiding and abetting fraud (Count XIV).

1. Negligent misrepresentation (Count V) professional malpractice (Count X)

KPMG argues that Plaintiffs' claims for negligent misrepresentation and professional malpractice are deficient because the claims are derivative, Plaintiffs have not pled the essential elements of the claims, and there is no relationship resembling privity between KPMG and Plaintiffs.

The Fourth District Court of Appeal has already held that Plaintiffs have stated a direct claim for negligent misrepresentation. *KPMG LLP v. Cocchi*, 35 Fla. L. Weekly D2897 (Fla. 4th DCA 2010). Plaintiffs' claim of professional malpractice is similarly direct insofar as it alleges individual harm and tortious conduct directed at the individual limited partners. *See id.* ("Because the claims of negligent misrepresentation

and violation of FDUTPA allege individual harm and involve torts directed at the individual limited partners, we conclude that the limited partners suffered individual harm"); *accord Saltz v. First Frontier, LP*, 2010 WL 5298225 (S.D.N.Y. Dec. 23, 2010) (ruling in other Madoff-related litigation that accountant's malpractice claims are direct to the extent they allege inducement).

In order to assert claims for negligent misrepresentation and professional malpractice, Plaintiffs must show that KPMG knew that Plaintiffs were part of a limited group of persons who would rely upon KPMG's audit reports and tax statements for a particular purpose (*i.e.*, for specific transactions). *See Machata v. Seidman & Seidman*, 644 So. 2d 114 (Fla. 4th DCA 1994); *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985). Thus, liability may be extended beyond those in privity with the accountant, but only when the accountant knows at the time the work is done that a limited group of third persons intend to rely upon the work for a specific transaction. *Machata*, 644 So. 2d at 115. Absent that knowledge and the use of that information for the precise or substantially similar transaction known of by the accountant, the accountant is not liable. *Id.*

Plaintiffs allege that KPMG audited the Rye Funds and communicated the results of its audits to Plaintiffs through Form K-1 tax statements and independent audit reports, and that KPMG used the information from its audits to prepare Form K-1 tax statements. Plaintiffs further allege that KPMG knew the identify of each Plaintiff and prepared individual Schedule K-1 tax statements for each Plaintiff that identified taxable income associated with each plaintiffs investment, and that KPMG knew that its audits and K-1

tax statements would be provided to Plaintiffs and would be relied on by them in making investment decisions and calculating their individual tax liabilities.

Under *Machata*, Plaintiffs have sufficiently alleged that KPMG knew that they were part of a limited group of persons who would rely upon the audits and K-1 statements for preparing taxes. Although KPMG argues that "Plaintiffs allege no factual basis for concluding that KPMG knew that the . . . Schedule K-1 would be used in the manner Plaintiffs allege," it is an obvious inference that the Schedule K-1 statements, *an IRS tax form identifying taxable income*, aided Plaintiffs in the preparation of their taxes. Plaintiff's allegations regarding KPMG's knowledge are therefore sufficient.

2. Aiding and abetting breach of fiduciary duty (Count XIII)

KPMG argues that Plaintiffs' claim for aiding and abetting breach of fiduciary duty is deficient. As is discussed *infra*, the Court is dismissing Plaintiffs' underlying claim for breach of fiduciary duty. Accordingly, Count XIII must also be dismissed. *See, e.g., Hogan v. Provident Life and Acc. Ins. Co.*, 2009 WL 3367327 (M.D. Fla. 2009) (despite valid cause of action for aiding and abetting breach of fiduciary duty, claim must be dismissed because of failure to sufficiently plead underlying fiduciary duty).

3. Aiding and abetting fraud (Count XIV)

A claim of aiding and abetting fraud requires a plaintiff to allege 1) the existence of the underlying fraud, 2) defendant's knowledge of the fraud, and 3) substantial assistance. *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006); *ZP No. 54 Ltd.*

Partnership v. fidelity and deposit Co. of Maryland, 917 So. 2d 368 (Fla. 5th DCA 2005). KPMG argues that Plaintiffs failed to allege that KPMG had actual knowledge of the underlying violation[1], and that KPMG substantially assisted the primary violator.

As discussed *infra*, Plaintiffs have sufficiently alleged the existence of the underlying fraud. Plaintiffs' allegations in the Amended Complaint, however, are insufficient to allege substantial assistance. With respect to an aiding and abetting fraud claim, the "substantial assistance" and "causation" elements are interrelated—whether the assistance is substantial or not is measured by whether the action of the aider and abettor proximately caused the harm on which the primary liability is predicated. *JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247 (S.D.N.Y. 2005). Substantial assistance occurs when a defendant affirmatively assists, or helps conceal, or *fails to act when required to do so*, thereby enabling the fraud to occur. *Nathan v. Siegal*, 592 F. Supp. 2d 452 (S.D.N.Y 2008). (emphasis added). Plaintiffs allege that, had KPMG performed an audit in accordance with the standards of the auditing professional, then it would not have missed the red flags that underlie Tremont's alleged fraud. However, where the primary fraud claim is predicated on misrepresentations in docu-

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[1] To state a claim for fraud in the inducement, the plaintiff must plead facts supporting an inference that: (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance. *Abry Partners V, L.P.v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

ments, *substantial assistance usually involves assistance in the preparation or dissemination of the documents. Id.* (emphasis added). Plaintiffs' claim for fraudulent inducement is based upon their alleged reliance on Tremont Defendants' website, brochure, and PPMs. The Amended Complaint does not adequately allege how KPMG's allegedly deficient audit assisted the Tremont Defendants in preparing or disseminating the website, brochure, or PPMs that allegedly fraudulently induced Plaintiffs to purchase or retain their limited partnership interests.

Plaintiffs have also not adequately alleged that KPMG had actual knowledge of the underlying fraud. Plaintiffs allege the conclusory statement that "KPMG had actual or constructive knowledge of the fraud." Constructive knowledge of the primary fraud is insufficient to support an aiding and abetting claim. *Filler v. Hanvit Bank*, 399 F. Supp. 2d 553 (S.D.N.Y 2004). Furthermore, stating that a defendant 'knew or should have known' is inadequate to support a claim of fraud. *Metro Comm. Corp. BVI, v. Advanced Mobilecomm Tech., Inc.*, 854 A.2d 121 (Del, Ch. 2004), *citing Twin Coach Co. v. Chance Vought Aircraft, Inc.*, 163 A.2d 278, 284 (Del. Super. 1960). Failure to investigate or discover warning signs of fraud also does not suffice to adequately allege the actual knowledge necessary to sustain an aiding and abetting claim. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs.*, 446 F. Supp. 2d 163, 203 (S.D.N.Y. 2006). Plaintiffs essentially allege that, had KPMG performed a GAAS- and GAAP- compliant audit, then it would not have missed the red flags that underlie Tremont's alleged fraud. These allegations do not give rise to an inference that KPMG had actual knowledge of the Tremont Defendants' alleged fraud. *See IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 2010 WL 5222125

(S.D.N.Y. Dec. 21, 2010). Accordingly, Plaintiffs' claim against KPMG for aiding and abetting fraud must be dismissed.

4. FDUTPA (Count IX)

The Fourth District Court of Appeal has already held that Plaintiffs' FDUTPA claim is direct rather than derivative. *KPMG LLP v. Cocchi,* 35 Fla. L. Weekly D2897 (Fla. 4th DCA 2010). KPMG additionally argues that Plaintiff's FDUTPA claim fails because the allegations in the Amended Complaint and the attached Confidential Private Placement Memoranda and Limited Partnership Agreements show that this claim is based on alleged securities transactions, and because FDUTPA does not regulate securities transactions, the claim should be dismissed.

Although the court did not dismiss this count of the original Complaint due to a question of fact as to whether the limited partnership interests at issue are securities, the inclusion of Exhibits 2-4 in the Amended Complaint effectively alleges additional facts that demonstrate that the investments at issue are securities:

> THESE *SECURITIES* HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1993. . . . THE *SECURITIES* OFFERED HEREBY MAY NOT BE SOLD, TRANSFERRED OR OTHERWISE DISPOSED OF BY AN INVESTOR UNLESS THEY ARE REGISTERED UNDER THE SECURITIES ACT

Am. Cmpl. Ex. 2-4; *see* Am. Cmpl. generally, AmJur Securities § 47; *see also* Fla. R. Civ. P. 1.130(b) ("Any exhibit attached to a pleading shall be considered a part thereof for all purposes"); *Abele v. Sawyer,* 750 So. 2d 70, 74 (Fla. 4th DCA 1999) ("[T]he exhibits are

encompassed within the four corners of the complaint and must be considered therewith.")

Plaintiffs argue that the investments at issue are unregulated hedge funds that are outside the list of transactions that are exempt from FDUTPA's scope. Although unregulated hedge funds are not listed in the transactions specifically exempt from FDUTPA's scope, the Florida Legislature expressly intended FDUTPA to be construed with "due consideration and great weight" to the interpretations of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). § 502.204, Fla. Stat. The FTC Act has been interpreted to preclude coverage to securities claims. *Crowell v. Morgan Stanley Dean Witter Servs., Co.*, 87 F. Supp. 2d 1287, 1294-95 (S.D. Fla. 2000), *citing Stephenson v. Paine Webber Jackson & Curtis, Inc.*, 839 F.2d 1095 (5th Cir. 1988); *Linder v. Durham Hoisery Mills, Inc.*, 761 F.2d 162 (4th Cir. 1985). Thus, FDUTPA likewise does not apply to claims arising from securities transactions. *See Crowell*, 87 F. Supp. 2d at 1294 (noting that FDUTPA is modeled after Section 5 of the Federal Trade Commission Act, and "the FTC Act has been consistently 'interpreted to preclude coverage of securities claims in the overwhelming majority of state and federal courts addressing this issue'), *Rogers v. Cisco Systems, Inc.*, 268 F. Supp. 2d 1305 (N.D. Fla. 2003) (determining that FDUTPA does not apply to "holding claims" arising from the retention of securities).

Congress has defined the term "security" in broad and general terms "to afford the investing public a full measure of protection." *Tippens v. Round Island Plantation, LLC*, 2009 WL 2365347, at *11 (S.D. Fla. 2009), *citing S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946); *see also Newman v. Family Management*

Corp., Fed. Sec. L. Rep. p. 95, 942 (S.D.N.Y. 2010) (in other Madoff-related litigation, ruling that misrepresentations related to non-covered partnership interests may be nonetheless "in connection with" covered securities within meaning of Securities Litigation Uniform Standards Act where the interests were created for the purpose of investing in such securities, and the misrepresentations had the effect of facilitating securities fraud). The limited partnership interests at issue were created for the purpose of investing in securities; thus, the interests are "in connection with" the sale securities and the FDUTPA claim "arises from" the sale of securities. Accordingly, Plaintiffs' claim against KPMG for violation of FDUTPA must be dismissed.

5. Forum non conveniens & New York's Martin Act

The Court considered KMPG's arguments regarding forum non conveniens and New York's Martin Act in its previous Motion to Dismiss. The Fourth District Court of Appeal affirmed the denial of KPMG's motion to dismiss based on forum non conveniens. ***KPMG, LLP v. Cocchi,*** 2010 WL 5174020 (Fla. 4th DCA 2010). As to KPMG's arguments regarding the Martin Act, the Court's prior rulings in its February 2, 2010 order stand.

The Tremont Defendants' Motion to Dismiss the Amended Complaint (Joined by the Rye Defendants)

The Amended Complaint contains five counts against the Tremont Defendants: violation of the Florida Securities and Investor Protection Act (Count I); negligence (Count II); fraud in the inducement (Count III); negligent misrepresentation (Count IV); breach of fiduciary duty (Count VI); violation of the Florida Prudent Investor Rule (Count VII); violation of the

Florida Unfair and Deceptive Trade Practices Act (Count VIII); breach of contract (Count XI); and aiding and abetting breach of fiduciary duty (Count XII).

1. Derivative or direct nature of claims

The Tremont Defendants argue that Counts VI (breach of fiduciary duty), VII (violation of the Prudent Investor Rule)[2] and XII (aiding and abetting breach of fiduciary duty) are derivative in nature and thus may be maintained, if at all, only by or on behalf of the limited partnerships and not by the plaintiffs on their own behalf.

Plaintiff argues that the motion to dismiss should be denied because it is unclear whether Florida or Delaware law should apply since a choice of law analysis is a fact-intensive inquiry that is better suited for summary judgment. However, the LPAs at issue contain an "Applicable Law" clause which states that the agreements shall be governed by, and construed in accordance with, the laws of Delaware. *See* Am. Cmpl. Ex. 7 § 11.06; Ex. 8 at § 10.7; Ex. 9 at § 9.7. Thus, Delaware law applies for determining whether Plaintiffs' claims are derivative or direct.

The determination of whether a claim is direct or derivative depends solely on: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). The Delaware Supreme Court has noted:

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[2] As discussed *infra*, the Court dismisses Count VII on other grounds.

> Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature. The mere fact that the alleged harm is ultimately suffered by, or the recovery would ultimately inure to the benefit of, the stockholders does not make a claim direct under *Tooley*. *In order to state a direct claim, the plaintiff must have suffered some individualized harm not suffered by all of the stockholders at large.*

Feldman v. Cutaia, 951 A.2d 727, 733 (Del. 2008) (emphasis added). The determination of whether a lawsuit is derivative or direct in nature is substantially the same for corporate cases as it is for limited partnership cases. *Litman v. Prudential Bache Props., Inc.*, 611 A.2d 12, 15 (Del. Ch. 1992). For a plaintiff to bring an individual action, he must be injured directly or independently of the limited partnership. *See id.*

A claim of mismanagement represents a direct wrong to the limited partnership that is indirectly experienced by all partners. *See Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348 (Del. 1988). Any devaluation of partnership interests is shared collectively, rather than independently by the plaintiff or any other individual partner. *Id.* Nevertheless, Plaintiffs argue that *Anglo American Security Fund, L.P. v. S.R. Global International Fund, LP*, 829 A. 2d 143 (Del. Ch. 2003) permits the filing of a direct action in the instant case. *Anglo American* states that "in some instances, the relationships among the parties and the function and structure of the partnership itself may diverge from the corporate model so dramati-

cally that some claims, which in a corporate context might be classified as derivative, *must* be brought as direct claims . . . to enable the injured parties to recover while preventing a windfall to individuals or entities whose interests were not injured." *Id.* at 151. The court determined that although a claim for diminution in value of a limited partnership would ordinarily be derivative in nature, the "operation and function of the [partnership] as specified in the [partnership] [a]greement diverge so radically from the traditional corporate model that the claims made in the complaint must be brought as direct claims." *Id.* at 152.

The Amended Complaint does not contain any allegations that the structure of the limited partnership somehow precludes Plaintiffs from recovering their alleged losses in a derivative suit, or that any limited partners have entered or exited the partnership so as to create the potential for a windfall to certain individuals. *See id.* (allowing claims to be brought directly because plaintiff had left the fund, and partners admitted after the reduction in value suffered no injury, thus derivative claims would "have the perverse effect of denying standing (and therefore recovery) to parties who were actually injured by the challenged transactions while granting ultimate recovery (and therefore a windfall) to parties who were not"); *accord Newman v. Family Mgmt. Corp.*, 2010 WL 4118083 (S.D.N.Y. Oct. 20, 2010). As alleged, Plaintiffs would be entitled to a *pro rata* share of any damages awarded for the loss of individual investments based upon their partnership interest and is therefore derivative in nature. Similarly, the individual Plaintiffs' alleged loss of individual investment opportunities cannot survive as a direct action, as there are no allegations as to how such losses consti-

tute individualized harm not suffered on *a pro rata* basis.

The Amended Complaint also alleges that Plaintiffs individually paid income taxes on phantom income. The individual payment of such taxes is an individualized harm suffered by each Plaintiff that cannot be recovered as simply a *pro rata* share of the limited partnership. *See Feldman,* 951 A.2d at 733 (noting that plaintiff failed to plead any facts from which the court could conclude that the alleged acts caused plaintiff harm *separate and distinct* from the alleged harm to the company) (emphasis added); *accord Little v. Cooke,* 652 S.E.2d 129 (Va. 2007) (holding that it was error to award "tax damages" to partnership in derivative suit because the damages were not sustained by the partnership). Thus, Plaintiffs have stated a direct claim of breach of fiduciary duty to the extent that they seek recovery of taxes paid on phantom income.

2. Exculpation provisions of the limited partnership agreements; Breach of fiduciary duty (Count VI)

The Tremont Defendants argue that portions of Counts II, IV, VI, VII, VIII, XI and XII are barred by the exculpation provisions of the limited partnership agreements between Plaintiffs and the limited partnerships in which they invested.

The Delaware Supreme Court has held that when a duty of care breach is not the exclusive claim, a court may not dismiss based solely upon an exculpatory provision. *Malpiede v. Towson,* 780 A.2d 1075, 1090-96 (Del. 2001); *Emerald Partners v. Berlin,* 787 A.2d 85 (Del. 2001). Defendants seek dismissal of six counts of the Amended Complaint pursuant to the excul-

pation clauses, only one of which is a claim for breach of fiduciary duty. Thus, dismissal based upon the exculpation clause is only arguably appropriate for Count VI.

Under limited partnership law, a claim of breach of fiduciary duty must be analyzed in terms of the partnership agreement, which is the operative governing instrument. *Sonet v. Timber Co., L.P.*, 772 A.2d 319 (Del. Ch. 1998). Each Rye Fund has its own LPA with its own exculpation clause. The exculpation clauses of the Prime Fund. LPA[3] and XL Fund LPA[4] both require that 1) the General Partner must reasonably believe its actions are in the best interest of the partnership and 2) it must select, engage, and retain its agents with reasonable care. Plaintiffs have pled facts sufficient to overcome the Prime Fund and

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[3] The exculpation clause in the *Prime Fund LPA* states that the "General Partner ... shall not be liable to any Limited Partner or the Partnership for mistakes of judgment or for action or inaction which said party *reasonably believed* to be in the best interests of the Partnership, or for losses due to such mistakes, action or inaction or to the negligence, dishonesty or bad faith of any employee, broker or other agent of the Partnership, provided that such employee, broker or (sic) was selected engaged or retained by the Partnership with *reasonable care.*" Am. Comp. Ex. 8 § 2.7 (emphasis added).

[4] The exculpation clause in the *XL Fund LPA* states that the General Partner is not liable "for errors of judgment or for action or inaction, whether or not disclosed, which said party *reasonably believed* to be in the best interests of the Partnership, or for losses due to such errors, action or inaction or to the negligence, dishonesty, or bad faith of any employee, broker or other agent of the General Partner or the Partnership, provided that such employee, broker or agent was selected, engaged or retained by the General Partner or the Partnership with *reasonable care* and in good faith." Am. Cmpl. Ex. 9 § 2.6 (emphasis added).

XL Fund exculpation clauses, as there are sufficient allegations that Tremont acted unreasonably. However, the Court must also determine whether Plaintiffs have sufficiently alleged facts to overcome the business judgment rule.

The exculpation clause of the Broad Market Fund LPA[5] protects acts other than willful misfeasance, bad faith, gross negligence or a reckless disregard of duty. Defendants argue that Plaintiffs' allegations are insufficient as a matter of law to establish the requisite level of misconduct to overcome the exculpation clause and the business judgment rule.

The general partner of a limited partnership owes direct fiduciary duties to the partnership and to its limited partners. *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood,* 752 A.2d 1175 (Del. Ch. 1999). Gross negligence, including a failure to inform one's self of available material facts, without more, does not constitute "bad faith" or a breach of the fiduciary duty to act in good faith that can rebut the presumptions of the business judgment rule. *In re Walt Disney Co. Derivative Litigation,* 906 A.2d 27 (Del. 2006). Thus, to constitute a claim for breach of fiduciary duty, Tremont's alleged actions would have to rise to the level of bad faith or willful misconduct. Plaintiff alleges that Tremont failed to perform due diligence, investigation, or analysis that other firms and reporters had done that caused

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[5] The exculpation clause in the *Broad Market Fund LPA* states that the "General Partner shall not be liable, responsible or accountable in damages or otherwise to any Limited Partners or the Partnership for any act or omission of such General Partner, except for acts or omissions constituting *willful misfeasance, bad faith, gross negligence or a reckless disregard of duty.*" Am. Cmpl. Ex. 7 § 3.09.

others to question Madoffs strategy and avoid investing with him. Plaintiffs have not adequately pled facts demonstrating bad faith or willful misconduct to overcome either the business judgment rule or the Broad Market Fund exculpation clause. Plaintiff's conclusory allegations that Tremont's actions constitute "an abuse of discretion, bad faith, gross negligence, and a reckless disregard of Tremont Partners' duty" are insufficient. *See, e.g., In re Citigroup, Inc Shareholder Derivative Litigation*, 964 A. 2d 106 (Del. Ch. 2009).[6]

3. Fraud in the Inducement (Count III)

The Tremont Defendants argue that Count III should be dismissed because Plaintiffs did not adequately plead intentional misconduct. To state a claim, a plaintiff must plead facts supporting an inference that: (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the

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[6] "The allegations in the Complaint amount essentially to a claim that Citigroup suffered large losses and that there were certain warning signs that could or should have put defendants on notice of the business risks related to Citigroup's investments in subprime assets. Plaintiffs then conclude that because defendants failed to prevent the Company's losses associated with certain business risks, they must have consciously ignored these warning signs or knowingly failed to monitor the Company's risk in accordance with their fiduciary duties. Such conclusory allegations, however, are not sufficient to state a claim for failure of oversight that would give rise to a substantial likelihood of personal liability, which would require particularized factual allegations demonstrating bad faith by the director defendants."

In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 126-27 (Del. Ch. 2009).

representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance. *Ably Partners V, L.P. v. F & W Acquisition LLC,* 891 A.2d 1032, 1050 (Del. Ch. 2006). While knowledge may be pled generally, when a plaintiff pleads a claim of fraud that charges that the defendants knew something, it must allege sufficient facts from which it can reasonably be inferred that this "something" was knowable and that the defendants were in a position to know it. *Id.*

Plaintiffs alleges that Defendants' marketing statements regarding investment oversight, research, due diligence, risk allocation, and portfolio management were false and misleading because Tremont provided "virtually no monitoring, oversight, manager research, due diligence, risk allocation analysis, or portfolio management with respect to the funds in which Plaintiffs invested. Rather, Tremont simply gave Plaintiff's investments to Madoff and BMIS without doing due diligence or ongoing monitoring of Madoff or BMIS." Plaintiff has alleged sufficient facts from which it can be reasonably inferred that the Defendants knowingly misrepresented facts in soliciting Plaintiffs' investments. Therefore, Plaintiffs have stated a claim for fraud in the inducement.

4. Violation of the Prudent Investor Act (Count VII)

The Tremont Defendants argue that Count VII should be dismissed because Florida Statute section 518.11 (the "Prudent Investor Act") regulates only the internal affairs of certain domestic entities that act in a fiduciary capacity. Accordingly, Defendants argue that section 518.11 is inapplicable because Count

VII challenges Defendant TPI's management of the internal affairs of the Rye Funds, which are organized as limited partnerships under the laws of Delaware. Such conduct, Defendants argue, is governed exclusively by Delaware law under Florida's internal affairs rule, codified by section 620.1901, which provides:

> The laws of the state or other jurisdiction under which a foreign limited partnership is organized govern relations among the partners of the foreign limited partnership and between the partners and the foreign limited partnership and the liability of partners as partners for an obligation of the foreign limited partnership.

§ 620.1901(1), Fla. Stat. (2010). The Prime Fund LPA and the XL Fund state that they are formed under the Delaware Revised Uniform Limited Partnership Act (6 Dec. C. § 17-101 et. seq.), and the Broad Market LPA states that the Certificate of Limited Partnership was filed with the Secretary of State of the State of Delaware. Accordingly, it is Delaware law, not Florida law, which governs any breach of the prudent investor rule, rendering section 518.11 inapplicable. Therefore, this count is dismissed.

5. Breach of contract (Count XI)

The Tremont Defendants argue that Count XI should be dismissed because Plaintiffs did not adequately allege a claim for breach of contract. Plaintiffs allege that under the LPAs, Tremont Partners "is responsible for the day-to-day and other operations and business of the Partnership;" that the partnerships are "organized for the purposes of generating capital appreciation by utilizing the strategies discussed in the Partnership's Amended and restated confidential

Private Placement Memorandum;" and that the LPA obligate the General Partners and its affiliates to "devote as much of their time to the investment activities of the Partnership as the General Partner deems reasonable under the circumstances."

The PPMs state that an investment advisor or advisors would be selected based upon the following criteria: 1) past performance and reputation, 2) the size and efficiency of the assets he managed, 3) continued favorable outlook for the strategy employed, 4) the ability of Partnership to make withdrawals or liquidate its investment. *See, e.g.,* Broad Market Fund LPA (Am. Cmpl. Ex. 2 at 10.). In the Amended Complaint, Plaintiffs allege that

> *[r]ather than use the strategies discussed in the PPMs,* Tremont Partners instead invested solely with Madoff and BMIS *without any significant review or monitoring* to ensure the investment strategies were actually being followed in accordance with the representations made in the PPMs. Tremont *devoted essentially no time* to the investment activities of the Rye Funds, again *passing off those duties entirely* to Madoff and BMIS."

(emphasis added). Defendants argue that TPI's delegation of authority to Madoff to invest the Funds' assets was authorized by, not a breach of, the LPAs. Although the LPAs permit the delegation of Tremont's duties, the extent and appropriateness of delegation is a question of fact that cannot be resolved in a motion to dismiss. *See McMullin v Beran,* 765 A.2d 910, 924-25 (Del. 2000). Furthermore, a delegation of contractual duties does not delegate liability. *See Reserves Dev. LLC v. Crystal Dev., LLC,* 986 A.2d 362, 370 (Del. 2009) ("Unless oblige agrees otherwise,

neither delegation of performance, nor a contract to assume the duty discharges any duty or liability of the delegator"). Plaintiffs' allegations sufficiently allege that Tremont breached the LPAs.

Plaintiffs also allege that the Tremont Partners breached its obligation to calculate the Net Asset Value (NAV) and the value of the limited partners' capital accounts, "because it did not properly monitor or verify the value of the funds' holding." Am. Cmpl. ¶211. Tremont argues that this allegation provides no basis for a breach of contract claim because nothing in the LPAs required Tremont to conduct its own valuation of the securities that Madoff purchased and sold on behalf of the Funds. The LPAs each require the General Partner to determine the NAV; whether or not Tremont breached that agreement by failing to monitor or verify the funds' holdings is a question of fact that cannot be resolved in a motion to dismiss. Therefore, the Motion to Dismiss is denied as to Count XI.

6. Aiding and abetting breach of fiduciary duty (Count XII)

Tremont Group Holdings argues that Plaintiffs' claim for aiding and abetting breach of fiduciary duty is deficient. As is discussed *supra*, the Court is dismissing Plaintiffs' claim for breach of fiduciary duty. Accordingly, Count XII must also be dismissed. *See, e.g., Hogan v. Provident Life and Acc. Ins. Co.*, 2009 WL 3367327 (MD. Fla. 2009) (despite valid cause of action for aiding and abetting breach of fiduciary duty, claim must be dismissed because of failure to sufficiently plead underlying fiduciary duty).

Based on the foregoing, KPMG's Motion to Compel Arbitration of Claims in the Amended Complaint is

DENIED. KPMG's alternative Motion to Dismiss is GRANTED without prejudice to amend as to Counts IX, XIII, and XIV; and DENIED as to the remaining Counts. It is further

ORDERED and ADJUDGED that the Tremont and Rye Defendants' Motion to Dismiss is GRANTED without prejudice to amend as to Counts VI, VII, XII; and DENIED as to the remaining Counts.

Plaintiffs may file a Second Amended Complaint within twenty (20) days of the date of this order.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this 25 day of January, 2011.

/s/ David E. French
David E. French
Circuit Judge

APPENDIX B

DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

No. 4D09-4867

KPMG LLP,

Appellant,

v.

ROBERT COCCHI, PENNY ELLEN FROMM, PEF ASSOCIATES, INC., BRIAN GAINES, JOHN JOHNSON, DR. DAVID SCHWARTZWALD, RAND SCHWARTZWALD, DR. HERBERT SILVERBERG, JOHN SILVERBERG, DR. JERRY WEISS, DONNA WEISS, THE NORMAN SHULEVITZ FOUNDATION, INC., RM MANAGEMENT, LLC, SANDE WISCHE, CAROL WISCHE, PAULA ZITRIN, DR. JARON ZITRIN, RACHEL ZITRIN, DR. ROGER ZITRIN, TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS, INC., RYE SELECT BROAD MARKET FUND, LP, RYE SELECT BROAD MARKET PRIME FUND, LP, RYE SELECT BROAD MARKET XL FUND, LP,

Appellees.

No. 4D10-988

KPMG LLP,

Appellant,

v.

ROBERT COCCHI, PENNY ELLEN FROMM, PEF ASSOCIATES, INC., BRIAN GAINES, JOHN JOHNSON, DR. DAVID SCHWARTZWALD, DR. HERBERT SILVERBERG, DR. JERRY WEISS, DONNA WEISS, THE NORMAN SHULEVITZ FOUNDATION, INC., RM MANAGEMENT, LLC, SANDE WISCHE, CAROL WISCHE, PAULA ZITRIN, DR. JARON ZITRIN, RACHEL ZITRIN, DR. ROGER ZITRIN, TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS, INC., RYE SELECT BROAD MARKET FUND, LP, RYE SELECT BROAD MARKET PRIME FUND, LP, RYE SELECT BROAD MARKET XL FUND, LP,

Appellees.

December 22, 2010

WARNER, J.

KPMG appeals two non-final appealable orders. Although filed as separate appeals, we consolidate them for purposes of this opinion. The plaintiffs have filed suit against KPMG and others for damages as a result of losses of their investment in several partnerships. KPMG audited financial statements of partnerships in which the plaintiffs invested. Although the plaintiffs assert multiple causes of action against KPMG, the plaintiffs essentially claim that KPMG failed to use proper auditing standards, and that they relied on KPMG's auditing statements to their detriment. In the first order, the trial court denied KPMG's motion to compel arbitration of the dispute. In the second, the trial court denied KPMG's motion to dismiss on *forum non conveniens* grounds. We affirm the order denying the motion to compel arbitration, because the arbitral agreement upon which KPMG

relied would not apply to the direct claims made by the individual plaintiffs. We affirm the order denying the motion to dismiss for *forum non conveniens*, because neither the motion nor its attached affidavit, nor the argument at hearing, was legally sufficient to overcome the strong presumption in favor of the resident plaintiffs' choice of forum.

The plaintiffs are nineteen individuals and entities, most of whom are Florida residents, who bought a limited partnership interest in one of three limited partnerships—referred to collectively here as the "Rye Funds."[1] The limited partnerships invested with Bernard Madoff in his infamous Ponzi scheme and lost millions of dollars. The limited partnerships were managed by Tremont Group Holding, Inc., and Tremont Partners, Inc. The plaintiffs sued the limited partnerships and the Tremont defendants, together with its auditing firm KPMG. As to KPMG, the plaintiffs alleged causes of action for negligent misrepresentation, violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), professional malpractice, and aiding and abetting a breach of fiduciary duty. Each cause of action is grounded in the alleged failure of KPMG to use proper auditing standards on the financial statements on which the plaintiffs relied in making and maintaining their investments in the partnerships. These resulted in substantial misrepresentations of the financial health of the partnerships, causing the plaintiffs to lose all of their investments.

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[1] The three partnerships are Rye Select Broad Market Fund, L.P., Rye Select Broad Market Prime Fund, L.P., and Rye Select Broad Market XL Fund, L.P.

KPMG first moved to compel arbitration, basing its claim on its audit services agreement with the Tremont Group Holding, Inc., which contained an arbitration clause. That clause purports to require arbitration and/or mediation of all disputes arising from the services performed by KPMG for the Tremont defendants under the agreement, "including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided." None of the plaintiffs, however, expressly assented in any fashion to this agreement or the arbitration provision. Instead, KPMG claimed that the plaintiffs' claims were derivative and arose from the audit services that KPMG performed under the contract. Therefore, according to KPMG, the arbitration clause should be enforced as to the plaintiffs' claims.

Both parties agree that Delaware law applies to the resolution of this issue, as the Rye Funds and the Tremont defendants were all Delaware partnerships. In *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004), the Delaware Supreme Court established a test when analyzing whether an action by stockholders (or limited partners) was direct or derivative of the corporation/general partnership's cause of action. The questions which must be asked are: 1) who suffered the harm, the corporation or the stockholders individually, and 2) who received the benefit of the recovery or remedy? Because the claims of negligent misrepresentation and violation of FDUTPA allege individual harm to the plaintiffs and involve torts directed at the individual limited partners, we conclude that the limited partners suffered individual harm. *See, e.g., Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003); *Newman v. Family Mgmt. Corp.*, 2010 WL

4118083 (S.D.N.Y. Oct. 20, 2010) (under Delaware law, common law claims of negligent misrepresentation and fraud were direct claims which could be brought by limited partners); *Stephenson v. Citco Group, Ltd.*, 700 F. Supp. 2d 599, 608-12 (S.D.N.Y. 2010) (negligent misrepresentation is a direct claim, and noting that the same set of facts may result in both direct and derivative claims). We therefore affirm the trial court's denial of the motion to compel arbitration.

KPMG also moved to dismiss on *forum non conveniens* grounds, claiming that all of its activities occurred in New York where it audited the defendants. With its motion it filed a two-page affidavit of a senior manager, stating that in connection with its agreement to audit the various limited partnerships, it performed all of its work in New York. The trial court denied the motion, concluding that the affidavit was insufficient to carry KPMG's burden of persuasion. On appeal, KPMG argues, among other things, that the trial court applied an incorrect legal standard in ruling on the *forum non conveniens* issue. Even if we were to agree, we conclude that the motion and supporting affidavit were legally insufficient to warrant a change of forum.

Florida has adopted the doctrine of forum *non conveniens* in *Kinney System, Inc. v. Continental Insurance Co.*, 674 So. 2d 86 (Fla. 1996), and it is now codified in Florida Rule of Civil Procedure 1.061(a), which provides:

> (a) Grounds for dismissal. An action may be dismissed on the ground that a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida when:

(1) the trial court finds that an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties;

(2) the trial court finds that all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice;

(3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternative forum; and

(4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.

A strong presumption favors a resident plaintiff's choice of forum. *See Kinney*, 674 So. 2d at 91; *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111 (Fla. 4th DCA 1997). The defendant seeking dismissal bears the burden of persuasion as to each factor. *See Bridgestone/Firestone N. Am. Tire, LLC v. Garcia*, 991 So. 2d 912, 916 (Fla. 4th DCA 2008); *DeLuca v. Hislop*, 868 So. 2d 1254, 1257 (Fla. 4th DCA 2004).

In this case, the motion and the affidavit addressed only one private interest factor, namely the issue of availability of defense witnesses and documents in New York. The mere fact that the defendant's witnesses and documents are all in another state does not automatically require dismissal for *forum non conveniens*, particularly considering the strong presumption in favor of the resident plaintiffs' choice of forum. Without addressing all of the factors of private interest, as well as factors of public interest,

the motion, the affidavit and the hearing argument were decidedly inadequate to warrant dismissal of the action. The trial court cannot be said to have abused its discretion in determining that the motion and affidavit were insufficient to carry the burden for KPMG.

Affirmed.

POLEN and FARMER, JJ., concur.

* * *

Appeal of non-final orders from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David E. French, Judge; L.T. Case No. 502009CA016230XXXXMB.

Edward A. Marod of Edward A. Marod, P.A., West Palm Beach, Gregory G. Ballard of Howrey LLP, New York, New York, and Williams & Connolly LLP, Washington, D.C., for appellant.

Marshall A. Adams and Richard A. Serafini of Adams, Cassidy & Phillippi, Fort Lauderdale, Jeff I. Ross of Ross & Orenstein LLC, James L. Volling, Michael F. Cockson and Liz Shields Keating of Faegre & Benson LLP, Minneapolis, Minnesota, and Gerald F. Richman and John R. Whittles of Richman Greer, P.A., West Palm Beach, for appellees Robert Cocchi, Penni Ellen Fromm, PEF Associates, Inc., Brian Gaines, John Johnson, Dr. Davis Schwartzwald, Rand Schwartzwald, Dr. Herbert Silverberg, John Silverberg, Dr. Jerry Weiss, Donna Weiss, The Norman Shulevitz Foundation, Inc., RM Management, LLC, Sande Wische, Carol Wische, Paula Zitrin, Dr. Jaron Zitron, Rachel Zitrin, and Dr. Roger Zitrin.

Not final until disposition of timely filed motion for rehearing.

APPENDIX C

KPMG VS. TREMONT
4TH DCA ORAL ARGUMENT
11-9-10

* * *

[15] THE COURT: The engagement letter?

MR. BALLARD: The engagement letter contains the arbitration agreement. So the arbitration agreement says this is governed by the FAA.

THE COURT: No, I understand that. But why are these plaintiffs bound by that the federal law in arbitration rather than Florida law?

MR. BALLARD: Because if they're right about their claims, think about their claims. It's a malpractice claim against KPMG. If they're right, they're bringing a claim that belongs to the Rye Funds. And the Rye Funds, they would be stepping into the shoes of the Rye Funds and acting in a derivative capacity on behalf of the Rye Funds.

As such, if they're derivative Plaintiffs, they're bound by all of the agreements of the Rye Funds. And there's extensive case law on this. There can't be a dispute that if the claims are derivative that the derivative Plaintiffs are bound by the arbitration clause and I can point you to cases. In fact, there are a couple of cases that have decided this very question in connection with KPMG's arbitration clause.

One of them is the In Re: Tremont case, which is another case brought by other limited [16] partners in the same funds. And it's a bunch of consolidated cases that were sent up to the Southern District of New York for Judge Grisay. These cases would be consolidated there and they would already be in

arbitration if they had filed in federal court or if they filed a case that could have been removed.

Judge Grisay in the case, this is a derivative case involving limited partners in the same funds. We moved to dismiss—we moved to compel arbitration on behalf of KPMG. That was granted and we've submitted the record, the opinion. So Judge Grisay determined that because those claims brought by derivative Plaintiffs standing in the shoes of the Rye Funds were derivative, they had to be arbitrated and granted the motion to arbitrate.

THE COURT: Did the Plaintiffs in that case take an appeal to the Circuit Court of Appeals?

MR. BALLARD: They have not taken an appeal. It is anticipated it will be going to arbitration. And then I would point out there are many cases that address this question of a derivative Plaintiff. Ernst & Young is one. Those Plaintiffs were sent to arbitration because it was deemed [17] derivative. There's a Verisign case that—

THE COURT: Where in the Federal Arbitration Act is there a direct derivative requirement?

MR. BALLARD: It's not. They are two separate questions. The direct—

THE COURT: I'm going to be candid with you as the person who wrote our own Morgan, Stanley decision, I'm not very sympathetic to binding people who never signed an arbitration agreement to arbitrate. I read our own Seifert decision, which the judge, Justice Anstead who wrote it says is similar to federal law in this regard is that both require under ordinary contract law principles that the person said to be bound by the arbitration clause must have at some

point manifested an assent to it. And I'm wondering where that comes about here whether they're derivative or direct.

MR. BALLARD: I'd like to address that and the Morgan, Stanley opinion in particular. That was a different issue. There the intent was to bind the Plaintiffs because they were alleged to be third-party beneficiaries.

THE COURT: You're also arguing this?

MR. BALLARD: I do as an alternative. But before you can get to the third-party beneficiary, [18] if they're asserting derivative claims on behalf of the Rye Funds, there is no question they must be bound by the Rye Funds agreements. They would be stepping into the shoes and acting under Delaware law as though they were the Rye Funds. They would be basically they would become the Rye Funds for that case.

So in that circumstance, the Plaintiff would not be the limited partners. The Plaintiff would be the fund. They would be acting for the fund assuming they could get standing to do this.

THE COURT: The Toole case and the other cases are not having to do with arbitration. They were dealing with (inaudible).

MR. BALLARD: The Toole case was not arbitration. However, Ernst & Young was an arbitration case. And that was a case where it was a different accounting firm. Ernst & Young had claims that plaintiffs attempted to bring—there were members of a limited liability corporation under Delaware law and they tried to bring what they called direct claims.

And the court said no, those are derivative claims. And if you're going to bring derivative claims on behalf of the entity, the Delaware

* * *

[29] the Plaintiff's claim that they paid taxes on income that didn't exist, do they have any recourse with the IRS?

MR. ROSS: No. It's a complicated answer. And let me retract from that. It's a complicated answer. To some degree there's recourse in some circumstances and it's highly complex.

THE COURT: Okay. Your reliance on Anglo-American, obviously it predated Toole. Does Toole negate Anglo-American in any regard?

MR. ROSS: Not in the least, Your Honor. Anglo and Toole are harmonious. It's exactly the same test. And if the court will indulge me, I'd like to address, if I may, the five recent cases, all of which rely on Toole and rely on Anglo-American for the proposition that in a situation like this, Plaintiffs claims are direct and not derivative.

THE COURT: You didn't supply us with supplemental cases?

MR. ROSS: No, Your Honor, I didn't and I apologize for that. I will do so immediately.

THE COURT: Does your opponent know you are going to be talking about these cases?

MR. ROSS: In all fairness, my opponent was [30] not aware that I was bringing these up, although in oral argument approximately a month ago on the second amended complaint, I talked about at least some of these. And counsel for the defendants in this

case presented certain of the other authorities to the court. I will be brief, but—

THE COURT: Why don't we do it this way. I know it's supplemental authorities. So that we have our oral argument based only on the written submissions at this point, if you don't mind.

MR. ROSS: Okay.

THE COURT: We can read them ourselves, you know.

MR. ROSS: In fairness to the panel and in fairness to opposing counsel, we absolutely will proceed on that basis. I would just like to say this much about it and I'll paraphrase. Five recent decisions. One is decided in the Southern District of Florida, I believe. Others involve—yeah, Southern District of Florida. Others involve Madoff Peter Fund. All are situations where they address specifically the issue which is before this court and they've all arisen since—

THE COURT: They all involve the arbitration?

MR. ROSS: They do not involve arbitration, [31] Your Honor. They involve direct versus derivative. And in every instance of these cases which I would present to the court,—

THE COURT: You can see that the direct/derivative test of Delaware law applies to determine whether this case is arbitrable under federal law?

MR. ROSS: We would concede that yes, Your Honor, that the direct/derivative issue is central to this court's decision.

THE COURT: You don't disagree with the issue under arbitration law, the federal arbitration law about what is arbitrable?

MR. ROSS: We do not agree that this case is governed by the Federal Arbitration Act. We never signed the arbitration agreement. You have to get to the point of finding us to be derivative?

THE COURT: That's what I was wondering.

MR. ROSS: No, we never get to that point, Your Honor. We are not governed by the Federal Arbitration Act.

THE COURT: So under the old choice of law rules that the forum provides its own law in matters procedural like this, we would apply Florida law as to whether this is—you're bound [32] by this arbitration agreement?

MR. ROSS: Your Honor, I think we are bound by Florida law. We are bound by your discussion in Morgan, Stanley. We are bound by Judge Warner's recent decision in Berkowitz vs. Smith. And also, Your Honor, on the key issue of these cases, these five cases which I refer to.

Essentially what they say is this, if the claims of the Plaintiffs go to mismanagement of the partnership, yes, those are derivative. But if there is fraud in the inducement, if the Plaintiffs, if the investors are saying we were induced to invest in this partnership due to fraud, those are direct under Delaware law. And all of the cases say exactly that.

THE COURT: Does that also cover negligent misrepresentation?

MR. ROSS: Absolutely covers negligent misrepresentation and these cases say precisely that, Your Honor.

THE COURT: How did the Southern District—I mean, that's obviously the same facts and they're

sending all of their cases to arbitration. Is there some aspect of that that are different?

MR. ROSS: In the Southern District of

* * *

APPENDIX D

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA016230XXXXMB
CIVIL DIVISION: "AD"

ROBERT COCCHI, PENNY ELLEN FROMM, PEF ASSOCIATES, INC., BRIAN GAINES, JOHN JOHNSON, DR. DAVID SCHWARTZWALD, DR. HERBERT SILVERBERG, DR. JERRY WEISS, DONNA WEISS, THE NORMAN SCHULEVITZ FOUNDATION, INC., RM MANAGEMENT, LLC, SANDE WISCHE, CAROL WISCHE, PAULA ZITRIN, DR. JARON ZITRIN, RACHEL ZITRIN, AND DR. ROGER ZITRIN,

Plaintiffs,

v.

TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS, INC., RYE SELECT BROAD MARKET FUND, LP, RYE SELECT BROAD MARKET PRIME FUND, LP, RYE SELECT BROAD MARKET XL FUND, LP, AND KPMG, LLP

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART KPMG, LLC'S MOTION TO DISMISS AND GRANTING IN PART AND DENYING IN PART TREMONT DEFENDANTS' MOTION TO DISMISS

THIS CAUSE having come before the Court upon the Motion to Compel Arbitration and to Stay the Action against KPMG, LLP or in the Alternative to

Dismiss the Action[1] filed by Defendant KPMG, LLP, and the Motion to Dismiss filed by Defendants Tremont Group Holdings, Inc. ("TGH") and Tremont Partners, Inc. ("TPI") (together, the "Tremont Defendants") and joined by Defendants Rye Select Broad Market Fund, L.P., Rye Select Broad Market Prime Fund, L.P., and Rye Select Broad Market XI Fund, L.P. (together the "Rye Defendants"). Having reviewed the motions and applicable law, having heard argument of counsel, and being otherwise fully advised in the premises, it is ORDERED and ADJUDGED as follows:

STANDARD OF REVIEW ON MOTION TO DISMISS

A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations of the complaint must be taken as true and all reasonable inferences construed in favor of the nonmoving party. *Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla 2006). To state a cause of action a complaint must allege sufficient facts to show that the pleader is entitled to relief. *Equity Premium, Inc. v. Twin City Fire Ins. Co.*, 956 So. 2d 1257, 1259 (Fla. 4th DCA 2007). When considering the merits of a motion to dismiss, a court is limited to the four corners of the complaint. *Id.* (Except when analyzing personal jurisdiction, venue, forum non-conveniens, and sufficiency of service of process where affidavits can be considered. *See Mancher v. Seminole Tribe of Florida*, 708 So. 2d 327, 328 (Fla. 4th DCA 1998)).

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[1] The Court denied KPMG's Motion to Compel Arbitration and to Stay the Action on November 6, 2009. This order addresses KPMG's alternative Motion to Dismiss.

DEFENDANT KPMG LLP'S MOTION TO DISMISS

The Complaint contains four counts against Defendant KPMG: negligent misrepresentation (Count V); violation of Florida's Unfair and Deceptive Trade Practices Act (Count IX); professional malpractice (Count X); and aiding and abetting breach of fiduciary duty (Count XIII). KPMG raises four arguments in support of its Motion to Dismiss: 1) that Plaintiffs lack of standing because claims are derivative; 2) that claims are barred by New York's Martin Act; 3) that Plaintiffs failed to allege sufficient facts for several causes of action; and 4) forum non conveniens. Each argument will be addressed in turn.

1. Standing

The determination of whether a claim is direct or derivative depends solely on: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).[2] When the corporation alone suffers the alleged harm, the claim is derivative. *Feldman v. Cutaia*, 956 A.2d 644, 655 (Del. Ch. 2007). Alternatively, when the stockholder can demonstrate individualized harm independent of the corporate harm, the cause of action is direct. *See id.*; *see also Litman v. Prudential-Bache Props., Inc.*, 611

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[2] "The test for distinguishing direct from derivative claims in the context of a limited partnership is substantially the same as that used when the underlying entity is a corporation." *Anglo Am. Security Fund, LP. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 150 (Del. Ch. 2003).

A.2d 12, 15 (Del. Ch. 1992) ("[F]ora plaintiff to bring an individual action, he must be injured directly or independently of the corporation") (citation omitted); *see also* Florida Jurisprudence § 4 (noting that a direct action "seeks redress for an injury suffered directly by the stockholder, which is separate from any injury sustained by the other stockholder").

In its inquiry, the Court is required to consider the nature of the alleged wrong, examine all of the pertinent facts as alleged in the Complaint, and determine for itself whether the claim is direct or derivative. *Agostino v. Hicks*, 2004 WL 443987, at *6 (Del. Ch. 2004). As such, the Court will consider each of Plaintiffs' claims in turn.

Violation of § 501.204, Fla. Stat., FDUPTA (Count IX)

Plaintiffs allege violations of Florida's Unfair and Deceptive Trade Practices. Florida courts recognize a private right of action under § 501.204, Fla. Stat. *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 774 (Fla. 2003) ("FDUPTA may be applied in a private cause of action arising from unfair or deceptive acts involving a single party in a single transaction or directed to a single contract"). As such, Plaintiffs can assert these claims directly.

Negligent Misrepresentation (Count V), Professional Malpractice (Count X), and Aiding and Abetting Breach of Fiduciary Duty (Count XIII)

Notwithstanding Plaintiffs arguments; the remainder of claims against KPMG are derivative and not direct. The Complaint alleges that KPMG "knew or should have known" that financial statements would be used by the limited partners. (Cmpl. ¶¶ 129, 151, 159). Plaintiffs, however have not alleged facts show-

ing that they can prevail on their claims without showing injury to the limited partnership. *See Agostino v. Hicks*, 2004 WL 443987 (2004). All of the alleged harm suffered by plaintiffs flow from obligations that KPMG owed directly to Tremont and the Funds. *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 887 (Del. Ch. 2009). Therefore, any recovery belongs to the limited partnership. *See also Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726 (Del. Ch. 1988) (derivative action was brought by shareholders for independent auditor's negligence and breach of contract resulting in loss to the corporation). The claims are derivative; therefore, Plaintiffs have not plead sufficient facts to demonstrate that they have standing to bring these claims

2. Choice of Law

KPMG argues that Plaintiffs' claims are barred by New York's Martin Act, N.Y. Gen. Bus. Law §§ 352-59, which prohibits fraudulent or deceitful practices in connection with the purchase or sale of securities "within or from" New York. Plaintiffs argue that Florida law governs the claims and that the Martin Act is therefore inapplicable.

Florida uses the "most significant relationship" test for determining choice of law, which requires consideration of 1) the parties' domiciles, residences, and places of incorporation and business; 2) where the conduct causing injury occurred; 3) where the parties' relationship is centered; and 4) where injury occurred. 2d Restatement § 145(2); *See Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980); *Brooks v. Suriano*, 497 So. 2d 976, 978 (Fla. 4th DCA 1986).

Plaintiffs allege that they are residents of Florida (15 of 19 Plaintiffs), Maryland (1 of 19 Plaintiffs), Nevada (1 of 19 Plaintiffs), New Jersey (1 of 19 Plaintiffs), and New York (1 of 19 Plaintiffs). The Defendant, Rye Funds are Delaware limited investment partnerships and have the same general partner, Defendant TPI, which has offices in New York. Defendant TGH is the corporate parent of Defendant TPI and has offices in New York. Defendant KPMG is the U.S. member of KPMG International, a Swiss cooperative, and maintains its U.S. headquarters in New York and has offices in Florida. The first factor weighs equally between Florida and New York.

It is not alleged in the Complaint where the conduct causing injury occurred. The counts against Defendant KPMG essentially allege that KPMG's audits of the Rye Funds' financial statements did not comply with Generally Accepted Auditing Standards and that it was foreseeable that the Plaintiffs would rely on this information. There are no allegations that KPMG conducted the audits in either Florida or New York; rather, Plaintiffs allege that the Rye Funds directed their activities at Florida by marketing products in Florida to Florida residents, communicating with Plaintiffs in Florida, and sending and receiving funds to and from Plaintiffs in Florida. The Complaint alleges that all Plaintiffs received audited financial statements for the Rye Funds. Therefore, the Court cannot determine which state this factor favors. Similarly, the Court cannot determine where the parties' relationship is centered.

In this case, determining which state's law applies is a fact-intensive inquiry that is better suited for summary judgment. *See, e.g., Rush v. Joyner*, 540 So. 2d 266 (Fla. 4th DCA 1989) (affirming application

of Florida law following cross-motions for summary judgment where no material issues of fact existed). It is premature to undertake a choice of law analysis at the motion to dismiss stage.

3. Negligent Misrepresentation (Count V)

At the hearing, Plaintiffs conceded KPMG's Motion to Dismiss as to negligent misrepresentation (Count V).

4. Professional Malpractice (Count X)

Defendant argues that the allegations in the Complaint are insufficient to state a cause of action for professional malpractice. In order to assert a claim of professional malpractice, Plaintiffs must show that KPMG knew that Plaintiffs were part of a limited group of persons who would rely upon KPMG's audit reports for a particular purpose (i.e., for specific transactions). *See Machata v. Seidman & Seidman*, 644 So. 2d 114 (Fla. 4th DCA 1994); *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985). Plaintiffs allege that KPMG "knew that its audited financial statement reports would be provided to limited partners and potential investors in the Rye Funds and would be relied on by them in making investment decisions. The purpose of the audit engagements was to provide an audit report to the limited partners. Thus, Plaintiffs are among the group that was intended to receive KPMG's audit reports."

These allegations are insufficient to state a cause of action for professional malpractice. *Compare Machata*, 644 So. 2d at 116 (holding that shareholders of corporation who acted in reliance upon accounting statements did not comprise a limited group of persons within the meaning of Restatement § 552(2)(a), and

accountants were not alleged to have been aware of a specific transaction for which the work was to be used) *with First Florida Bank N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla 1990) (holding that, despite lack of privity between accountant and bank, accountant was liable to bank where accountant negotiated loan on behalf of a bank client and personally delivered statements to bank with knowledge that it would rely upon them in considering whether to make a loan).

5. Aiding and Abetting Breach of Fiduciary Duty (Count XIII)

There is a claim for aiding and abetting the breach of fiduciary duty when a plaintiff pleads four elements: 1) a fiduciary duty on the part of the primary wrongdoer, 2) *a breach of this fiduciary duty*, 3) knowledge of the breach by the alleged aider and abettor, and 4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *AmeriFirst Bank v. Bomar*, 757 F. Supp. 1365 (S.D. Fla. 1991); *Lou v. Belzberg*, 728 F. Supp. 1010 (S.D.N.Y. 1990) (emphasis added). As is discussed *infra*, the Court is granting the Tremont Defendants' Motion to Dismiss as to Count VI, because it fails to allege sufficient facts to support a cause of action for breach of fiduciary duty. Since the Complaint does not contain sufficient allegations that the underlying fiduciary duty was breached, Count XIII must also be dismissed. *See, e.g., Hogan v. Provident Life and Acc. Ins. Co.*, 2009 WL 3367327 (M.D. Fla. 2009) (despite valid cause of action for aiding and abetting breach of fiduciary duty, claim must be dismissed because of failure to sufficiently plead underlying fiduciary duty).

6. Florida's Deceptive and Unfair Trade Practices Act (Count IX)

KPMG argues that Plaintiffs have failed to state a cause of action under FDUTPA. First, KPMG argues that New York substantive law applies. As stated *supra*, however, it is premature for the Court to determine whether Florida or New York applies to the instant case. Second, Defendant argues that securities transactions are not within the intended scope of FDUTPA. Plaintiff responds that the investments at issue are not securities. Whether or not the investments are securities is a question of fact that the Court cannot resolve in a motion to dismiss. Third, Defendant argues that no cause of action can lie under FDUTPA where the alleged acts, injuries, and the non-resident Plaintiffs have no connection to Florida. However, the Complaint contains sufficient allegations that the non-resident Plaintiffs made investments in Florida, received documents in Florida, received account statements and audited financial statements and other communications in Florida.

7. Forum non conveniens

Motions to dismiss based upon forum non conveniens must be analyzed in accordance with Florida Rule of Civil Procedure 1.061(a). Rule 1.061(a) provides that an action may be dismissed on the ground that a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida when:

> (1) the trial court finds that an adequate alternative forum exists which possesses jurisdiction over the whole case, including all of the parties;

(2) the trial court finds that all relevant factors of private interest favor the alternative forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice;

(3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and

(4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.

Fla.. R. Civ. Pro. 1.061(a); *see also Kinny Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996). It is axiomatic that the movant has the burden of persuasion of each prong of the forum non conveniens analysis. *Cardoso*, 879 So. 2d at 1250; *see also Bridgestone/Firestone North American Tire LLC v. Garcia*, 33 Fla. L. Weekly D1921 (Fla. 4th DCA 2008). Trial courts must "conduct an analysis of these factors before ruling on a forum non conveniens motion." *TRW Automotive U.S., LLC v. Papandopoles*, 949 So. 2d 297, 301 (Fla. 4th DCA 2007).

The relevant factors of private interest that must favor the alternative forum include:

(1) adequate access to evidence and relevant sites;

(2) adequate access to witnesses;

(3) adequate enforcement of judgments;

(4) the practicalities and expenses associated with the litigation.

See Fihe v. Rexall Sundown, Inc., 966 So. 2d 415, 420 (Fla. 4th DCA 2007) (citing *Kinney Sys., Inc.*, 674 So. 2d at 91). All relevant factors of private interest

must favor the alternative forum. Fla. R. Civ. P. 1.061(a)(2). The affidavit of Daniel Davitt that KPMG filed in support of the motion is insufficient to establish that all relevant factors of private interest favor the New York courts. KPMG has not overcome the strong presumption in favor of Plaintiffs' choice of forum.

THE TREMONT DEFENDANTS' MOTION TO DISMISS (JOINED BY THE RYE DEFENDANTS)

The Tremont Defendants raise ten arguments in support of their Motion to Dismiss: 1) the exculpation provisions of the partnership agreements; 2) lack of standing; 3) proximate cause; 4) failure to state a claim under Florida Securities Law; 5) FDUPTA's application to securities transactions; 6) failure to state a claim for breach of fiduciary duty; 7) failure to attach a copy of the alleged contract to the complaint; 8) the fraud claim is duplicative; 9) failure to plead a violation of Florida's Prudent Investor Rule; and 10) failure to adequately plead a claim for aiding and abetting. Each argument will be addressed in turn.

1. The Exculpation Provisions of the Partnership Agreements

The Tremont Defendants argue that Plaintiffs' claims, other than fraud in the inducement (Count 3) and violation of the Florida Securities Law (Count 1) should be dismissed because they are barred by the exculpation provisions of the LPAs. The LPAs were not attached to the Complaint but certain portions were attached as exhibits to the Tremont Defendants' Motion to Dismiss. Defendant relies upon *In re Estate of DeLuca*, 748 So. 2d 1086 (Fla. 4th DCA 2000) to persuade the court to consider these documents. However, in *DeLuca* the Fourth District held that the

trial court did not look beyond the "four corners of the complaint" because the petition for revocation specifically referred to prior-filed statements of claim in the probate case and stated that the petition "relates back hereto." The court is limited to the four corners of the complaint, must accept all facts alleged as true, and must draw all reasonable inferences in favor of the pleader. *Goodall v. Whispering Woods Center, LLC*, 990 So. 2d 695 (Fla. 4th DCA 2008). The LPAs at issue are neither attached to the Complaint nor referenced by it, and therefore cannot be considered.

2. Standing

The determination of whether a claim is direct or derivative depends solely on: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley*, 845 A.2d at 1033.[3] When the corporation alone suffers the alleged harm, the claim is derivative. *Feldman*, 956 A.2d at 655. Alternatively, when the stockholder can demonstrate individualized harm independent of the corporate harm, the cause of action is direct. *See id.*; *see also Litman*, 611 A.2d at 15 ("[F]or a plaintiff to bring an individual action, he must be injured directly or independently of the corporation") (citation omitted); Florida Jurisprudence § 4 (noting that a direct action "seeks redress for an injury suffered

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[3] "The test for distinguishing direct from derivative claims in the context of a limited partnership is substantially the same as that used when the underlying entity is a corporation." *Anglo Am. Security Fund*, 829 A.2d at 150; *see also Wulsin v. Palmetto Fed Sav. & Loan Ass'n.*, 507 So. 2d 1149 (Fla. 3d DCA 1987) (holding that limited partners, like corporate shareholders, may bring derivative actions on behalf of the limited partnership).

directly by the stockholder, which is separate from any injury sustained by the other stockholders").

In its inquiry, the Court is required to consider the nature of the alleged wrong, examine all of the pertinent facts as alleged in the Complaint, and determine for itself whether the claim is direct or derivative. *Agostino*, 2004 WL 443987, at *6. As such, the Court will consider each of plaintiffs' claims:

> *Violation of § 517301, Fla. Stat., Fraudulent Securities Transactions (Count I); Negligence Per Se for Violation of Statutory Duties under § 517.301, Fla. Stat. (Count II) and Violation of § 501.204, Florida Deceptive and Unfair Trade Practices Act (Count VIII)*

With respect to the claims relating to violations of § 517.301, Fla. Stat. (Counts I and II) and § 501.204, Fla. Stat. (Count VIII), Plaintiffs have properly asserted direct claims against defendants. Florida courts recognize a private right of action under both § 517.301, Fla. Stat. and § 501.204, Fla. Stat. *See Compania de Elaborados de Café v. Cardinal Capital Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1280 (S.D. Fla. 2003) (noting that there was a private right of action under § 517.301); *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 774 (Fla. 2003) ("FDUPTA may be applied in a private cause of action arising from unfair or deceptive acts involving a single party in a single transaction or directed to a single contract"). As such, Plaintiffs can assert these claims directly.

> *Fraud in the Inducement (Count III) and Negligent Misrepresentation (Count IV)*

Plaintiffs' allegations of fraud in the inducement and negligent misrepresentation are direct. Plaintiffs allege that Tremont and the Funds intentionally

and/or negligently misrepresented, concealed, and omitted facts in soliciting Plaintiffs' investments. These misrepresentations were found in Defendants' websites, promotional materials, fact sheets, and correspondence. Plaintiffs argue that they were harmed when they relied on these misrepresentations when deciding whether to invest, maintain, or withdraw their investments. Because the issue of reliance is unique to each individual, Plaintiffs' claims are direct in nature and may be brought individually by the Plaintiffs. *See Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1188 (Del. 1988) ("Standing to pursue a derivative claim for injury to the corporate entity should not be confused with the right of a former shareholder claimant to assert a timely filed private cause of action premised upon a claim of unfair dealing, illegality, or fraud").

Breach of Fiduciary Duty (Count VI)

Plaintiffs' allegations of breach of fiduciary duty against Tremont and the Funds are derivative. According to Plaintiffs, defendants failed to exercise clue care in selecting an investment advisor, failed to monitor the Fund's investments, and/or failed to place adequate controls and safeguards in place. The Court notes that Plaintiffs have not attached the limited partnership agreement. As such, the Court cannot properly determine the extent of fiduciary duties that exist between the parties. 6 Del. C. § 17-101(d) ("To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner . . . the partner or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the

implied contractual covenant of good faith and fair dealing"); *see also Brinkerhoff v. Texas E. Products Pipeline Co., LLC*, 2010 WL 175091, at *18 (Del. Ch. 2010) (noting that limited partnership agreement limited the default fiduciary duty provisions provided by Delaware statute). However, as alleged, the Court finds the breach of fiduciary duty claims are derivative.

Violation of § 518.11, Fla. Stat, Prudent Investor Rule (Count VII)

Plaintiffs' claim of violation of the prudent investor rule is derivative. Specifically, Plaintiffs allege that Defendants breached their fiduciary duties by failing to exercise reasonable care and caution and failing to exercise reasonable business judgment when they selected investment advisors. As a result, Plaintiffs suffered the complete loss of their investment with the Funds. Here, Plaintiffs have not pled facts showing that they suffered harm independent of the limited partnership. Rather, any breach of fiduciary duties that resulted in loss of investment capital injured the limited partnership and must be brought derivatively. *See Tooley*, 845 A.2d at 1039.

Breach of Contract against Tremont Partner (Count XI)

Plaintiffs allege breach of contract claims against Tremont and the Funds. The Court cannot evaluate the nature of plaintiffs' breach of contract claim without reference to the Limited Partnership Agreements, which plaintiffs failed to attach to the Complaint. *See* Del. C. § 171101(f) ("A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a

partner or other person to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement; provided, that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing").

Aiding and Abetting Breach of Fiduciary Duty (Count XII)

Plaintiffs' allegations of Tremont's aiding and abetting the Funds in their breach of fiduciary duties is derivative. Plaintiffs allege that Tremont aided and abetted the Funds in their breach of fiduciary duties by directing and participating in their performance. Similar to the breach of fiduciary duty claims, facts have not been alleged showing that the limited partners can prevail in their claim without showing harm to the limited partnership. *See Tooley*, 845 A.2d at 1039.

3. Proximate Cause

The Tremont Defendants argue that Plaintiffs claims should be dismissed because they have not pled facts sufficient to show that Tremont's alleged actions created a temptation "to which a 'recognizable percentage' of persons would yield" or where "persons of a peculiarly vicious type are likely to be." *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 610 F.3d 613 (10th Cir. 1998) (dismissing complaint filed by victims of terrorist bombing against manufacturer of ammonium nitrate, which was sold as fertilizer and was allegedly used to construct bomb; failure to state a claim due to supervening cause); *Nat'l Airliens, Inc. v. Edwards*, 336 So. 2d 545 (Fla. 1976) (dismissing complaint filed by passenger of hijacked airplane

against the airline to recover for illness and injuries sustained as a result of being forced to consume Cuban food and drink; failure to state a claim due to intervening cause). The present case is inapposite to the authority cited by the Defendants.

4. Florida Securities and Investor Protection Act (Count 1)

The Tremont Defendants argue that Plaintiffs fail to state a claim for violation of § 517.301, the Florida Securities and Investor Protection Act, because they do not adequately allege that the Tremont Defendants made a misrepresentation of a material fact. A claim for violation of FSIPA requires allegations that there was a misrepresentation of a material fact on which the investor relied. *Kashner Davidson Sec. Corp. v. Desrosiers*, 689 So. 2d 1106, 1107 (Fla. 2d DCA 1997). Tremont Defendants argue that TPI's alleged promises to take certain actions in the future are insufficient as a matter of law to constitute misrepresentations unless the promises are made with no intention of performing. *See Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So. 2d 168 (Fla. 4th DCA 1995). Defendants also argue that the allegation that Tremont "knew that . . . they would not monitor Madoff" is insufficient to satisfy their pleading burden.

The allegations in the Complaint are sufficient to state a cause of action. The general rule of law is that a false statement of fact must concern a past or existing fact in order to be actionable. *Id.* The Complaint sufficiently alleges that Tremont and Rye misrepresented material facts in soliciting Plaintiffs' investments in the Rye Funds, and that those misrepresentations involved not only future actions but Tremont and Rye's current (at the time of the solici-

tation) investment strategy and investment process. The Complaint also alleges that the Defendants misrepresented past facts concerning the historical performance of the funds.

Defendants argue that Count I is barred by the statute of repose as to Robert Cocchi because this action was not commenced within five years from the date the alleged violation occurred. *See* § 95.11(4)(e). It is alleged in the Complaint that Cocchi invested in Rye Prime in April 2004 and this action was filed in May 2009, which is just over five years. However, the Complaint alleges ongoing misrepresentations upon which the Plaintiffs continued to rely. Therefore, the Complaint contains sufficient allegations to avoid application of the statute of repose at this time.

Defendants also argue that there is not a sufficient nexus with Florida to justify the application of section 517.301. Similar to the choice of law issue, discussed *supra*, the existence of a territorial nexus is a fact-intensive inquiry that cannot be resolved at this procedural stage. *See, e.g., Petrites v. J.O Bradford & Co.*, 646 F.2d 1033 (5th Cir. 1981).

5. FDUPTA's Application to Securities Transactions (Count VIII)

The Tremont Defendants argue that Plaintiffs' FDUTPA claim arises out of their purchase of limited partnership interests, and that FDUPTA is therefore inapplicable because those interests are securities. Plaintiffs argue that the limited partnership interests at issue are not securities. This is a question of fact that the Court cannot resolve in a motion to dismiss.

6. Breach of Fiduciary Duty (Count VI)

The Tremont Defendants argue that the Complaint fails to state a claim for breach of fiduciary duty because the allegations are insufficient to overcome the presumptions of the business judgment rule. Claims involving breach of fiduciary duties are subject to the laws of the state of incorporation. 8A Fla. Jun 2d Business Relationships § 285; Restatement (Second) of Conflict of Laws § 302; *In re Friedlander Capital Management Corp.*, 411 B.R. 434 (Bankr. S.D. Fla. 2009).

Delaware law protects the managers of a corporation through the business judgment rule, which is "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company." *Ryan v. Gifford*, 918 A.2d 341 (Del. Ch. 2007). A plaintiff must allege facts sufficient to rebut the business judgment rule. *Id.* Unless there is a showing of an abuse of discretion, fraud, bad faith, or illegality, the court will not substitute its judgment for that of the board so long as the action taken was rational. *See Unocal Corp v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985). Plaintiffs alleged that the Tremont Defendants and Rye Funds breached their fiduciary duties by failing to exercise due care and did not perform due diligence but did not allege facts sufficient to overcome the business judgment rule. Therefore, the allegations in the Complaint are insufficient to state a cause of action for the Tremont and Rye Defendants' breach of fiduciary duty.

7. Breach of Contract (Count XI)

Plaintiffs' breach of contract claim must be dismissed for failing to attach the LPAs to, or incorporate them in, the Complaint. *See, e.g., Safeco Ins. Co. of Am. v. Ware*, 401 So. 2d 1129, 1130 (Fla.. 4th DCA 1981).

8. Fraud in the Inducement (Count III)

The Tremont Defendants and Rye Defendants argue that Plaintiffs' claim for Fraud in the Inducement (Count III) must be dismissed because it is duplicative of the breach of contract claim (Count XI). Although parties in privity of contract are generally prohibited from recovering in tort for economic damages, torts committed independently of the contract breach, such as fraud in the inducement, are permitted. *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004) (citing *HTP, Ltd. v. Linneas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996)); *see also W.I.T. Holding Corp.*, 282 A.D.2d, 527, 528 (2001) (holding that although a cause of action alleging fraud does not lie where the only fraud claim relate to a breach of contract, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud). Accordingly, the claim of fraud in the inducement is not duplicative of the breach of contract claim.

9. Violation of Florida's Prudent Investor Rule (Count VII)

The Tremont Defendants argues [sic] that Plaintiffs cannot state a claim for violation of Florida's Prudent Investor Rule because the statute applies to a "trust, guardianship, or probate estate" and not hedge fund

managers. *See* §§ 518.11(1)(a), (c), (d), and (f). However, section 518.14 specifically provides that the provisions of s. 518.11 shall govern fiduciaries acting under wills, *agreements*, court orders, and *other instruments*. Thus, except for the standing, issue addressed *supra*, Plaintiffs have adequately stated a claim for violation of Florida's Prudent Investor Rule.

10. Aiding and Abetting Breach of Fiduciary Duty (Count XII).

As is discussed *infra*, the Court is granting the Tremont Defendants' Motion to Dismiss as to Count VI, because it fails to allege sufficient facts to support a cause of action for breach of fiduciary duty. Since the Complaint does not contain sufficient allegations that the underlying fiduciary duty was breached, Count XIII must also be dismissed. *See, e.g., Hogan v. Provident Life and Acc. Ins. Co.*, 2009 WL 3367327 (M.D. Fla. 2009) (despite valid cause of action for aiding and abetting breach of fiduciary duty, claim must be dismissed because of failure to sufficiently plead underlying fiduciary duty).

Based on the foregoing, it is ORDERED and ADJUDGED that the Tremont and Rye Defendants' Motion to Dismiss is GRANTED without prejudice to amend as to Counts VI, VII, XI, XII; and DENIED as to the remaining Counts.

It is further ORDERED and ADJUDGED that KPMG's Motion to Dismiss is GRANTED without prejudice to amend as to Counts V, X, and XIII; and DENIED as to the remaining Counts.

Plaintiffs may file an amended Complaint within twenty (20) days of the date of this order.

DONE AND ORDERED in Chambers at Palm Beach County, Florida this 5 day of February 2010.

/s/ David E. French
David E. French
Circuit Judge

APPENDIX E

STATE OF FLORIDA
IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT PALM BEACH COUNTY

Case No.: 502009CA016230 XXXX MB AD

ROBERT COCCHI, PENNY ELLEN FROMM, PEF ASSOCIATES, INC., BRIAN GAINES, JOHN JOHNSON, DR. DAVID SCHWARTZWALD, RAND SCHWARTZWALD, DR. HERBERT SILVERBERG, JOHN SILVERBERG, DR. JERRY WEISS, DONNA WEISS, THE NORMAN SHULEVITZ FOUNDATION, INC., RM MANAGEMENT, LLC, SANDE WISCHE, CAROL WISCHE, PAULA ZITRIN, DR. JARON ZITRIN, RACHEL ZITRIN, AND DR. ROGER ZITRIN,
Plaintiffs,

vs.

TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS, INC., RYE SELECT BROAD MARKET FUND, L.P., RYE SELECT BROAD MARKET PRIME FUND, L.P., RYE SELECT BROAD MARKET XL FUND, L.P. AND KMPG, LLP,
Defendants.

PROPOSED ORDER RELATING TO KPMG LLP'S MOTION TO COMPEL ARBITRATION AND TO STAY THE ACTION AGAINST KPMG LLP

THIS CAUSE having come on to be heard on Defendant KPMG LLP's Motion to Compel Arbitration and to Stay the Action Against KPMG LLP and the Court having received the written and oral argument of counsel, and being otherwise advised in the Premises, it is hereupon

ORDERED AND ADJUDED that said Motion be, and the same is hereby, DENIED.

DONE AND ORDERED in Chambers, in the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, this 2 day of November, 2009.

IT IS SO ORDERED.

/s/ David E. French
The Honorable David E. French

APPENDIX F

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FOURTH DISTRICT,
1525 PALM BEACH LAKES BLVD.,
WEST PALM BEACH, FL 33401

CASE NO. : 4D10-988
L.T. No.: 502009CA016230XXXX MB

KPMG LLP,
Appellant / Petitioner(s),

v.

ROBERT COCCHI, *et al.*,
Appellee / Respondent(s).

February 15, 2011

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed January 6, 2011, for clarification, reconsideration, rehearing, rehearing en banc and certification is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

[SEAL]

APPENDIX G

EXHIBIT 1

KPMG LLP
757 Third Avenue
New York, NY 10017

Telephone 212 758 9700
Fax 212 872 3001
Internet www.us.kpmg.com

November 23, 2004

Tremont Capital Management Inc.
555 Theodore Fremd Avenue
Rye, NY 10580

Attention: Arthur Brown, Chief Financial Officer

This letter will confirm our understanding of our engagement to provide professional services to certain partnerships (the "Partnerships") within Tremont Capital Management, Inc. ("Tremont" or the "Company")

Objectives and limitations of services

Audit Services

We will issue a written report upon our audits of the Partnerships' financial statements as set forth in Appendix I.

* * *

Dispute Resolution

Any dispute or claim arising out of or relating to the engagement letter between the parties, the services provided thereunder, or any other services provided by or on behalf of KPMG or any of its subcontractors or agents to Tremont or at its request (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved in accordance with the dispute resolution procedures set forth in Appendix II, which constitute the sole methodologies for the resolution of all such disputes. By operation of this provision, the parties agree to forego litigation over such disputes in any court of competent jurisdiction. Mediation, if selected, may take place at a place to be designated by the parties. Arbitration shall take place in New York, New York. Either party may seek to enforce any written agreement reached by the parties during mediation, or to confirm and enforce any final award entered in arbitration, in any court of competent jurisdiction.

Notwithstanding the agreement to such procedures, either party may seek injunctive relief to enforce its rights with respect to the use or protection of (i) its confidential or proprietary information or material or (ii) its names, trademarks, service marks or logos, solely in the courts of the State of New York or in the courts of the United States located in the State of New York. The parties consent to the personal jurisdiction thereof and to sole venue therein only for such purposes.

* * *

Appendix II

Dispute Resolution Procedures

The following procedures are the sole methodologies to be used to resolve any controversy or claim ("dispute"). If any of these provisions are determined to be invalid or unenforceable, the remaining provisions shall remain in effect and binding on the parties to the fullest extent permitted by law.

Mediation

Any party may request mediation of a dispute by providing a written Request for Mediation to the other party or parties. The mediator, as well as the time and place of the mediation, shall be selected by agreement of the parties. Absent any other agreement to the contrary, the parties agree to proceed in mediation using the CPR Mediation Procedures (effective April 1, 1998) issued by the Center for Public Resources, with the exception of paragraph 2 which shall not apply to any mediation conducted pursuant to this agreement. As provided in the CPR Mediation Procedures, the mediation shall be conducted as specified by the mediator and as agreed upon by the parties. The parties agree to discuss their differences in good faith and to attempt, with facilitation by the mediator, to reach a consensual resolution of the dispute. The mediation shall be treated as a settlement discussion and shall be confidential. The mediator may not testify for any party in any later proceeding related to the dispute. No recording or transcript shall be made of the mediation proceeding. Each party shall bear its own costs in the mediation. Absent an agreement to the contrary, the fees and expenses of the mediator shall be shared equally by the parties.

Arbitration

Arbitration shall be used to settle the following disputes: (1) any dispute not resolved by mediation 90 days after the issuance by one of the parties of a written Request for Mediation (or, if the parties have agreed to enter or extend the mediation, for such longer period as the parties may agree) or (2) any dispute in which a party declares, more than 30 days after receipt of a written Request for Mediation, mediation to be inappropriate to resolve that dispute and initiates a Request for Arbitration. Once commenced, the arbitration will be conducted either (1) in accordance with the procedures in this document and the Rules for Non-Administered Arbitration of the CPR Institute for Dispute Resolution ("CPR Arbitration Rules") as in effect on the date of the engagement letter or contract between the parties, or (2) in accordance with other rules and procedures as the parties may designate by mutual agreement. In the event of a conflict, the provisions of this document and the CPR Arbitration Rules will control.

The arbitration will be conducted before a panel of three arbitrators, two of whom may be designated by the parties using either the CPR Panels of Distinguished Neutrals or the Arbitration Rosters maintained by any United States office of the Judicial Arbitration and Mediation Service (JAMS). If the parties are unable to agree on the composition of the arbitration panel, the parties shall follow the screened selection process provided in Section B, Rules 5, 6, 7, and 8 of the CPR Arbitration Rules. Any issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these procedures, including any contention that all or

part of these procedures are invalid or unenforceable, shall be governed by the Federal Arbitration Act and resolved by the arbitrators. No potential arbitrator shall be appointed unless he or she has agreed in writing to abide and be bound by these procedures:

The arbitration panel shall issue its final award in writing. The panel shall have no power to award non-monetary or equitable relief of any sort. Damages that are inconsistent with any applicable agreement between the parties, that are punitive in nature, or that are not measured by the prevailing party's actual damages, shall be unavailable in arbitration or any other forum. In no event, even if any other portion of these provisions is held to be invalid or unenforceable, shall the arbitration panel have power to make an award or impose a remedy that could not be made or imposed by a court deciding the matter in the same jurisdiction.

Discovery shall be permitted in connection with the arbitration only to the extent, if any, expressly authorized by the arbitration panel upon a showing of substantial need by the party seeking discovery.

All aspects of the arbitration shall be treated as confidential. The parties and the arbitration panel may disclose the existence, content or results of the arbitration only as provided in the CPR Arbitration Rules. Before making any such disclosure, a party shall give written notice to all other parties and shall afford such parties a reasonable opportunity to protect their interests.

The award reached as a result of the arbitration will be binding on the parties, and confirmation of the arbitration award may be sought in any court having jurisdiction.

* * *

EXHIBIT 2

KPMG LLP
345 Park Avenue
New York, NY 10154

Telephone 212 758 5700
Fax 212 758 9819
Internet www.us.kpmg.com

Tremont Group Holdings Inc.
555 Theodore Fremd Avenue
Suite C-300
Rye, NY 10580

October 6, 2006

Attention: Anthony Marcello, AVP-Product Operations:

This letter will confirm our understanding of our engagement to provide professional services to the Funds listed in Appendix I.

Objectives and Limitations of Services

Audit Services

We will issue a written report upon our audits of the financial statements of the Funds as set forth in Appendix I, herein after referred to as the "Funds".

* * *

Dispute Resolution

Any dispute or claim arising out of or relating to the engagement letter between the parties, the services provided thereunder, or any other services provided by or on behalf of KPMG or any of its subcontractors or agents to the Funds or at its request (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved in accordance with the dispute resolution procedures set forth in Appendix II which constitute the sole methodologies for the resolution of all such disputes. By operation of this provision, the parties agree to forego litigation over such disputes in any court of competent jurisdiction. Mediation, if selected, may take place at a place to be designated by the parties. Arbitration shall take place in New York, New York. Either party nary seek to enforce any written agreement reached by the parties during mediation, or to confirm and enforce any final award entered in arbitration, in any court of competent jurisdiction.

Notwithstanding the agreement to such procedures, either party may seek injunctive relief to enforce its rights with respect to the use or protection of i) its confidential or proprietary information or material or ii) its names, trademarks, service marks or logos, solely in the courts of the State of New York or in the courts of the United States located in the State of New York. The parties consent to the personal jurisdiction thereof and to sole venue therein only for such purposes.

* * *

Appendix II

Dispute Resolution Procedures

The following procedures are the sole methodologies to be used to resolve any controversy or claim ("dispute"). If any of these provisions are determined to be invalid or unenforceable, the remaining provisions shall remain in effect and binding on the parties to the fullest extent permitted by law.

Mediation

Any party may request mediation of a dispute by providing a written Request for Mediation to the other party or parties. The mediator, as well as the time and place of the mediation, shall be selected by agreement of the parties. Absent any other agreement to the contrary, the parties agree to proceed in mediation using the CPR Mediation Procedures (effective April 1, 1998) issued by the Center for Public Resources, with the exception of paragraph 2 which shall not apply to any mediation conducted pursuant to this agreement. As provided in the CPR Mediation Procedures, the mediation shaft be conducted as specified by the mediator and as agreed upon by the parties. The parties agree to discuss their differences in good faith and to attempt, with facilitation by the Mediator, to reach a consensual resolution of the dispute. The mediation shall be treated as a settlement discussion and shall be confidential. The mediator may not testify for any party in any later proceeding related to the dispute. No recording or transcript shall be made of the mediation proceeding. Each party shall bear its own costs in the mediation. Absent an agreement to the contrary, the fees and expenses of the mediator shall be shared equally by the parties.

Arbitration

Arbitration shall be used to settle the following disputes: (1) any dispute not resolved by mediation 90 days after the issuance by one of the parties of a written Request for Mediation (or, if the parties have agreed to enter or extend the mediation, for such longer period as the parties may agree) or (2) any dispute in which a party declares, more than 30 days after receipt of a written Request for Mediation, mediation to be inappropriate to resolve that dispute and initiates a Request for Arbitration. Once commenced, the arbitration will be conducted either (1) in accordance with the procedures in this document and the Rules for Non-Administered Arbitration of the CPR Institute for Dispute Resolution ("CPR Arbitration Rules") as in effect on the date of the engagement letter or contract between the parties, or (2) in accordance with other rules and procedures as the parties may designate by mutual agreement. In the event of a conflict, the provisions of this document and the CPR Arbitration Rules will control.

The arbitration will be conducted before a panel of three arbitrators, two of whom may be designated by the parties using either the CPR Panels of Distinguished Neutrals or the Arbitration Rosters maintained by any United States office of the Judicial Arbitration and Mediation Service (JAMS). If the parties are unable to agree on the composition of the arbitration panel, the parties shall follow the screened selection process provided in Section B, Rules 5, 6, 7, and 8 of the CPR Arbitration Rules. Any issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these procedures, including any contention that all or part of these

procedures are invalid or unenforceable, shall be governed by the Federal Arbitration Act and resolved by the arbitrators. No potential arbitrator shall be appointed unless he or she has agreed in writing to abide and be bound by these procedures.

The arbitration panel shall issue its final award in writing. The panel shall have no power to award non-monetary or equitable relief of any sort. Damages that are inconsistent with any applicable agreement between the parties, that are punitive in nature, or that are not measured by the prevailing party's actual damages, shall be unavailable in arbitration or any other forum. In no event, even if any other portion of these provisions is held to be invalid or unenforceable, shall the arbitration panel have power to make an award or impose a remedy that could not be made or imposed by a court deciding the matter in the same jurisdiction.

Discovery shall be permitted in connection with the arbitration only to the extent, if any, expressly authorized by the arbitration panel upon a showing of substantial need by the party seeking discovery.

All aspects of the arbitration shall be treated as confidential. The parties and the arbitration panel may disclose the existence, content or results of the arbitration only as provided in the CPR Arbitration Rules. Before making any such disclosure, a party shall give written notice to all other parties and shall afford such parties a reasonable opportunity to protect their interests.

The award reached as a result of the arbitration will be binding on the parties, and confirmation of the arbitration award may be sought in any court having jurisdiction.

* * *

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
SEP 12 2011
OFFICE OF THE CLERK

No. 10-1521

In The
Supreme Court of the United States

KPMG LLP,

Petitioner,

v.

ROBERT COCCHI, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Fourth District Court Of Appeal Of The State Of Florida

BRIEF FOR RESPONDENTS ROBERT COCCHI, ET AL. IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Florida court of appeal's failure to expressly address the derivative status under Delaware state law of each of respondents' state-law claims presents a question for review by this Court.

PARTIES TO THE PROCEEDINGS

Respondents represented in this opposition are Robert Cocchi, Penni Ellen Fromm, PEF Associates, Inc., Brian Gaines, John Johnson, Dr. David Schwartzwald, Rand Schwartzwald, Dr. Herbert Silverberg, John Silverberg, Dr. Jerry Weiss, Donna Weiss, The Norman Shulevitz Foundation, Inc., RM Management, LLC, Sande Wische, Carol Wische, Paula Zitrin, Dr. Jaron Zitrin, Rachel Zitrin, and Dr. Roger Zitrin.

When this opposition refers to "respondents," it is referring to the parties listed in this section. Other respondents are represented by separate counsel.

RULE 29.6 STATEMENT

Respondents PEF Associates, Inc., the Norman Shulevitz Foundation, Inc., and RM Management, LLC are the only corporate respondents. None of them has a parent corporation nor do any publicly held corporations own 10 percent or more of respondent corporations' stock.

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INTRODUCTION

The Florida court of appeal's decision denying KPMG's motion to compel arbitration turned, not on a disputed question of federal law under the Federal Arbitration Act ("FAA"), but on the Delaware state-law question whether respondents' claims against petitioner KPMG are direct or derivative. The court's state-law basis for decision eliminates any conflict with this Court's decisions and makes summary reversal inappropriate. It may also present a jurisdictional bar to review in this Court under 28 U.S.C. § 1257(a).

At issue in the court below was whether respondents' four state-law claims against KPMG arising out of the Madoff fraud are subject to arbitration. As KPMG admits, *see* Pet. 21, this issue turns on a question of Delaware state law. If respondents' claims are derivative under Delaware law, they are subject to arbitration; but if they are direct, they are not. Neither party disputes this point.

In the Florida court of appeal, respondents argued that their claims are direct under Delaware law, and the court agreed. It denied KPMG's motion to compel arbitration "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." Pet. App. 24a-25a. The court expressly explained why two of respondents' claims were direct, but it did not expressly discuss the other two. *Id.*

KPMG argues that the court's silence as to the direct status of two of respondents' claims must mean that the court found them to be derivative and then decided to flout this Court's settled precedent under the FAA, 9 U.S.C. §§ 1 *et seq.* But that is not remotely plausible. Respondents did not ask the court to abandon federal law and refuse to compel arbitration of derivative claims; they argued only that their claims were direct as a matter of Delaware state law. The Florida court of appeal has also repeatedly enforced the very decisions of this Court that KPMG now accuses it of flouting and has itself consistently espoused the "strong federal policy in favor of enforcing arbitration agreements." *E.g.*, *Green Tree Serv., LLC v. McLeod*, 15 So. 3d 682, 687 (Fl. Dist. Ct. App. 2009) (citing *Dean Witter Reynolds Inv. v. Byrd*, 470 U.S. 213, 218 (1985)).

KPMG's fabricated conflict, based on its speculation about what the Florida court of appeal might have done, does not remotely support its request for summary reversal. Summary reversal is an extreme remedy that requires a clear conflict with this Court's established precedent. There is no clear conflict here; indeed, there is no conflict at all. The Florida court of appeal did not dispute that all arbitrable claims must be sent to arbitration even if other claims in the case are not arbitrable. It also did not dispute that nonsignatories to arbitration agreements may sometimes be bound by those agreements under state law. The court did not commit any error, let alone an error "so apparent as to warrant the bitter medicine of

summary reversal." *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting).

Moreover, the Florida court of appeal's reliance on a state-law basis for decision may even present a jurisdictional bar to review. "[J]urisdiction cannot be founded upon surmise." *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). And "[w]here the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Id.* at 54-55. The fact that the decision below turned on the Florida court's determination whether all of respondents' claims were direct as a matter of Delaware state law precludes review in this Court.

Finally, as even KPMG tacitly concedes, there is no basis here for granting plenary review. The Florida court of appeal's decision does not implicate a circuit split or otherwise raise an important and recurring question of federal law. It is an interlocutory decision making a factbound application of Delaware state law. KPMG is not entitled to present its failing arguments to yet another court. Respondents respectfully request the Court to deny review.

STATEMENT OF THE CASE

KPMG's claimed "irreconcilable conflict" with this Court's decisions in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), and *Arthur Andersen LLP, et al. v. Carlisle, et al.*, 129 S. Ct. 1896 (2009), and hostility toward the federal policy in favor of enforcing arbitration agreements is entirely fabricated. The court of appeal's decision is based on the state-law conclusion that respondents' claims against KPMG are direct under Delaware law, and it is wholly consistent with this Court's precedent.

I. Respondents' Claims Against KPMG.

Respondents are nineteen individuals and entities who own limited partnership interests in one or more of three funds, collectively known as the Rye Funds. The Rye Funds, which KPMG audited, fed respondents' money to Bernard L. Madoff Investment Securities, LLC. After Madoff's now-infamous Ponzi scheme was uncovered, respondents lost millions of dollars. These losses were the direct result of KPMG's failure to perform its duties.

In May 2009, respondents filed suit against KPMG asserting claims for negligent misrepresentation, violation of the Florida Deceptive and Unfair Trade Practices Act, professional malpractice, and aiding and abetting a breach of fiduciary duty. Shortly after, KPMG filed a motion to compel arbitration under the arbitration agreement between KPMG and

the Rye Funds. Respondents were not a party to that arbitration agreement.

II. The Proceedings Below On KPMG's Motion To Compel Arbitration.

The issue in this case with respect to the arbitrability of respondents' claims always has been and continues to be one of Delaware state law – whether respondents' claims are direct or derivative of claims the Rye Funds could bring. KPMG agrees that this is true. *See* Pet. 21 ("[B]oth parties agreed that the dispositive question was whether plaintiffs' claims are derivative or direct under Delaware law.").

In its memorandum in support of its June 2009 Motion to Compel Arbitration, KPMG argued, based on state law, that respondents were bound by the arbitration provision in the Engagement Agreement between the Rye Funds and KPMG "because their claims against KPMG LLP are derivative." *See* KPMG LLP's Mem. in Support of Its Mot. to Compel Arbitration and to Stay the Action Against It, at 3-8. In response, respondents maintained that their claims against KPMG were direct as a matter of Delaware state law and therefore fell outside the Engagement Agreement. *See* Plaintiffs' Opposition to KPMG's Mot. to Compel Arbitration and to Stay the Action Against KPMG LLP, at 3, 7-9. On November 2, 2009, the trial court denied KPMG's motion without comment. *See* Pet. App. 59a-60a.

KPMG then appealed, and the argument again focused on the key disputed issue – whether respondents' claims are direct or derivative under Delaware law. KPMG argued that "[a]lthough [respondents] are not signatories to the arbitration agreement, they are nevertheless bound by it because the claims they assert are derivative." *See* Initial Brief of Appellant KPMG LLP, at 13; *see also id.*, at 14-29 ("Delaware law determines whether [respondents'] claims are derivative."). In response, respondents again argued, based on Delaware state law, that their claims are direct and therefore not subject to the arbitration agreement. *See generally*, Answer Brief of Plaintiffs/Appellees. At no point did respondents argue that, even if their claims were derivative, the court should refuse to compel arbitration.

The Florida court of appeal affirmed the trial court's order, finding that the arbitration agreement "would not apply to the direct claims made by the individual plaintiffs." Pet. App. 25a. At no time did the court of appeal conclude or otherwise indicate that any of respondents' claims were derivative, that the existence of some nonarbitrable claims renders all claims nonarbitrable, or that nonsignatories to arbitration agreements are categorically not bound by those agreements. KPMG petitioned the Florida court of appeal for rehearing and rehearing *en banc*, which

was denied without comment. Pet. App. 61a.[1] KPMG's petition to this Court followed.

REASONS FOR DENYING THE PETITION

I. The Decision Below Turns On A Question Of State Law And Does Not Address Any Disputed Issue Of Federal Law.

KPMG asks for the extraordinary remedy of summary reversal based on a supposed conflict between the decision below and this Court's settled precedent under the FAA. The conflict, however, is fabricated. The Florida court of appeal's decision turns on a question of Delaware state law and does not address any disputed issue of federal law.

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[1] KPMG makes a number of references to trial court orders that are immaterial to this Petition. First, the trial court's order on February 5, 2010, while appeal was pending, finding that three of respondents' claims were derivative is immaterial because the court of appeal was made aware of it, *see* Pet. 11 n.3, and, based on its opinion, disagreed with the trial court. KPMG also faults the trial court for its January 25, 2011 order "summarily refus[ing] to compel arbitration, even though it had held that three of plaintiffs' four claims were derivative." Pet. 24. Because the trial court entered this order after the court of appeal denied KPMG's motion to compel arbitration, it is similarly immaterial. The trial court can hardly be faulted for heeding the order of a higher court, and, in any event, it is the court of appeal's decision, not the trial court's, that is the subject of this Petition.

Summary reversal is "bitter medicine," *Spears*, 555 U.S. at 268 (Roberts, C.J., dissenting), that the Court reserves for the "exceptional" situation "in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error," *Wyrick v. Fields*, 459 U.S. 42, 50 (1982) (Marshall, J., dissenting). It is an "extraordinary remedy" not to be used lightly. *See Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting).

A. KPMG's petition manufactures the alleged conflict with this Court's *Dean Witter* decision.

The decision below does not justify the "extraordinary remedy" of summary reversal because the conflict that KPMG alleges does not exist. KPMG argues that the court of appeal's decision is "irreconcilable" with this Court's decision in *Dean Witter* because the Florida court held that "the presence of two claims it deemed not subject to arbitration authorized the denial as to all claims against KPMG." Pet. 16. This is pure speculation, unsupported by anything in the decision below. Based on the parties' briefs, the precedent of the Florida court, and the court's own opinion, the court denied KPMG's motion to compel arbitration because it found all of respondents' claims to be direct and "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs."

Pet. App. 24a-25a. There is no conflict with this Court's decisions.

KPMG bases its speculative argument of a conflict, not on anything the Florida court of appeal wrote, but on what it did not write. The court of appeal expressly discussed why it found two of respondents' claims to be direct but did not expressly discuss the other two. KPMG argues that this silence *must* mean that the court: (a) concluded that the other two claims were derivative and thus subject to arbitration; yet (b) decided that it would nonetheless refuse to compel arbitration in direct contradiction of this Court's precedent. KPMG's argument about what the court must have done is not remotely plausible, let alone a certainty.

Respondents at no point argued that the court of appeal should refuse to compel arbitration of their claims, even if they were derivative.[2] Instead, they argued simply that their claims are direct as a matter of Delaware law, as Delaware law provides. *See, e.g., Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008); *see also Arthur Andersen*, 129 S. Ct. at 1902 ("state law . . . is applicable to determine which contracts are binding under § 2."); Pet. 9 n.2 (acknowledging that "general principles of Delaware state law" govern

[2] KPMG's citation to the position taken by plaintiff investors in other cases in other states with respect to the arbitrability of claims under different states' laws, *see* Pet. 8, is irrelevant to this Petition.

whether respondents' claims are direct or derivative); *id.* at 20-21 (same). It is unlikely, to say the least, that the court would refuse to compel arbitration of respondents' claims even if it found them derivative, when respondents never requested that relief.

It is all the more unlikely because the Florida court of appeal has consistently and faithfully applied the arbitration precedent that KPMG claims it disregarded. Citing this Court's decision in *Dean Witter*, the Florida court of appeal has repeatedly acknowledged the "strong federal policy in favor of enforcing arbitration agreements," *Green Tree Serv., LLC v. McLeod*, 15 So. 3d 682, 687 (Fl. Dist. Ct. App. 2009), and noted that arbitration agreements must be "rigorously enforce[d]." *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 605 (Fl. Dist. Ct. App. 2007). Indeed, citing *Dean Witter*, the court has specifically held that courts must "compel arbitration of pendent arbitrable claims . . . *even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.*" *Finn v. Prudential-Bache Sec.*, 523 So. 2d 617, 619 (Fl. Dist. Ct. App. 1988) (emphasis added); *see also Seretta Constr., Inc. v. Great Am. Ins. Co.*, 869 So. 2d 676, 680 (Fl. Dist. Ct. App. 2004) ("Indeed, the United States Supreme Court in numerous interpretations of the Federal Arbitration Act . . . has concluded that the Federal Arbitration Act was intended only to assure the enforcement of privately negotiated arbitration agreements, *despite the possible inefficiencies created by such enforcement.*") (emphasis added). Moreover, both before and after this

Court's decision in *Arthur Andersen*, the Florida court of appeal has also acknowledged that a non-signatory can be bound to arbitrate. *See Liberty Commc'ns, Inc. v. MCI Telecomms. Corp.*, 733 So. 2d 571, 573 (Fl. Dist. Ct. App. 1999) (before); *Gencom Group v. Garcia Stromberg, LLC*, 34 So. 3d 170, 171 (Fl. Dist. Ct. App. 2010) (after).[3]

The speculative nature of KPMG's argument is revealed even in its own Petition, where it cannot identify with any certainty what the conflict is but is forced to argue that this Court should spend its limited resources to address an error "to the extent" one occurred. *See* Pet. 19 ("*To the extent* the Florida court of appeal . . . refused to compel arbitration because plaintiffs had not signed the KPMG arbitration agreement. . . .") (emphasis added); *id.*, at 22 ("*To the extent* the court declined to compel arbitration . . . even though it concluded that they were derivative. . . .") (emphasis added).

The decision below does not present any substantial question of federal law for this Court's review. It applies the settled arbitration precedent of this Court and the Florida court of appeal to a factbound ruling on the Delaware state-law question

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[3] Against this consistent precedent, KPMG relies on one comment by one of the three panel judges on the court of appeal to support its speculation of hostility toward arbitration. This Court does not sit to review comments at oral argument.

whether respondents' claims are direct or derivative. For this reason, the Petition should be denied.

B. The Court may lack jurisdiction to grant review.

This Court possesses jurisdiction to review a decision of a state court only if that decision represents a "final judgment[ ] or decree" on a substantial federal question. 28 U.S.C. § 1257(a). In cases "[w]here the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Lynch*, 293 U.S. at 54-55.

Here, the very most that KPMG can argue is that the Florida court of appeal *may* have decided the case on a federal ground that respondents did not argue. That is not enough to support jurisdiction because "jurisdiction cannot be founded upon surmise." *Id.* at 54. This is another reason to deny review.

II. The Interlocutory Nature Of The Issue Further Compels Denial Of The Petition.

The interlocutory posture of the decision below is a further reason to deny review. This Court has long held that it does "not issue a writ of certiorari to review a decree . . . from an interlocutory order, unless it is necessary to prevent *extraordinary*

inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (stating that the lack of finality in the judgment below may "of itself alone" provide "sufficient ground for denial of the application."). Certiorari is only granted from interlocutory orders in "extraordinary cases" of "peculiar gravity and general importance" where the lower court has clearly erred. *See Hamilton-Brown*, 240 U.S. at 258; *cf. Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997).

The order sought to be reviewed in this case is interlocutory and the case, despite having been filed over two years ago, is still in its infancy. KPMG has not raised any argument that it is suffering the kind of "extraordinary inconvenience" this Court has required to grant the writ at this interlocutory stage. That KPMG may be arbitrating in other suits arising out of similar claims by other plaintiffs in other states does not meet this burden and is frequently undertaken by litigants across the country in suits of all kinds. Finally, as stated, the court's decision was neither clearly erroneous, nor does it raise a conflict of "peculiar gravity" warranting intervention at this stage in the litigation.

III. The Florida Court Of Appeal's Decision Does Not Warrant Plenary Review.

KPMG does not seriously contend that plenary review is appropriate in this case, nor could it. The

Florida court of appeal's decision rests solely on a question of state law and does not conflict with the decisions of this Court or the federal circuit courts. If review were granted in this Court, the parties would not dispute the settled principles of law under the FAA; instead, they would continue to dispute the Delaware state-law question whether respondents' claims are derivative or direct. Moreover, the nature of the Florida court of appeal's decision and the settled precedent upon which this Petition is based makes it unlikely that any issue will be recurring or that a decision by this Court will have any lasting impact. Plenary review is therefore not proper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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RECORD AND BRIEFS

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KPMG LLP,

Petitioner,

v.

ROBERT COCCHI, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida

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SCHOLARLY AUTHORITY

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INTRODUCTION

Petitioner KPMG LLP previously demonstrated that the Florida court of appeal's refusal to compel arbitration of respondents' claims under the Federal Arbitration Act ("FAA") conflicts with this Court's decisions holding that (1) a court must compel arbitration of individual claims that are subject to arbitration even if other claims are not, Pet. 3–4, 13–14, 16–19; and (2) courts may not disregard generally applicable state law that "'permit[s] arbitration by or against nonparties to the written arbitration agreement,'" *id.* at 4, 14–15, 19–23. Respondents do not challenge these controlling legal principles, but instead argue that review should be denied because the Court "may lack jurisdiction," Opp. 12; the decision below is interlocutory, *id.* at 12–13; and the court below did not violate this Court's decisions under the FAA, *id.* at 8–12.

These arguments have no merit. *First*, this Court has jurisdiction over the decision below because the court of appeal denied KPMG's request to compel arbitration under the FAA. The FAA renders agreements to arbitrate enforceable as a matter of federal law. 9 U.S.C. § 2; *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896, 1901 (2009) (FAA creates "substantive federal law regarding the enforceability of arbitration agreements"). The court of appeal's refusal to compel arbitration under the FAA is a federal determination within this Court's jurisdiction. See *Michigan* v. *Long*, 463 U.S. 1032, 1040–41 (1983).

Second, the interlocutory nature of the decision below highlights the need for immediate review. Respondents cite inapposite cases and ignore this Court's holding that "to delay review of a state judicial decision denying enforcement of the contract

to arbitrate until the state-court litigation has run its course would defeat the core purpose of the contract to arbitrate" under the FAA. *Southland* v. *Keating*, 465 U.S. 1, 7–8 (1984). That ruling applies directly in this case.

Finally, the decision below should be set aside because it flouts this Court's command that courts must rigorously enforce arbitration agreements even if the result is piecemeal litigation. See *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Respondents now argue that there is no conflict because the court of appeal held all their claims "to be direct," Opp. 8, but the decision below provides no support for that conclusion, as respondents acknowledged below, see Pet. 12. The court's refusal to follow controlling law under the FAA should be reversed and the case remanded for proceedings not inconsistent with the Court's judgment. Alternatively, the Court should grant plenary review.

I. THE COURT SHOULD EXERCISE JURISDICTION OVER THE COURT OF APPEAL'S REFUSAL TO COMPEL ARBITRATION UNDER THE FAA.

Respondents challenge the Court's jurisdiction and argue that it should deny review because the decision below is interlocutory. Opp. 3, 12–13. These arguments are addressed in turn.

1. Respondents argue, quoting *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54–55 (1934), that the "Court may lack jurisdiction" because "'if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain [the judgment], this Court will not take jurisdiction.'" Opp. 12. Respondents assert that, at best, the court

below "*may* have decided the case on a federal ground" and that is not enough. *Id.* Respondents are seeking to revive a legal standard this Court abandoned more than 25 years ago, and their substantive argument reflects a fundamental misunderstanding of the FAA's requirements.

First, *Lynch* does not set forth the legal standard for assessing whether a state-court ruling rests on an adequate and independent state-law ground. In *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court, citing *Lynch* and other precedents, "openly admit[ted] that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue." *Id.* at 1038. The Court abandoned *Lynch* and other cases because they were "unsatisfactory," *id.* at 1039–40, and instead held that when a state-court decision "fairly appears" to be "interwoven with the federal law," and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so," *id.* at 1040–41.

Second, Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA thus "creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts to place such agreements on the same footing as other contracts." *Arthur Andersen*, 129 S. Ct. at 1901 (internal quotation marks omitted). In the courts below, KPMG sought to compel arbitration under the FAA because it had broad arbitration agreements with the Rye Funds that encompassed respondents' claims and that were binding on

respondents because their claims were derivative of the Rye Funds' rights. Pet. 10–11.

This Court has jurisdiction because there is no adequate and independent state-law ground supporting the decision below. The court of appeal's refusal to compel arbitration under Section 2 of the FAA is governed by federal law and thus inherently is a determination "interwoven with the federal law." As a result, this Court has jurisdiction to review the state court's refusal to compel arbitration under the FAA. See *Long*, 463 U.S. at 1040–41.

2. Respondents likewise argue that review should be denied because the decision is interlocutory and the Court thus should grant review only if there is a showing of "'extraordinary inconvenience.'" Opp. 12–13 (emphasis omitted) (quoting *Am. Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893)). Here too, respondents' argument relies on inapposite cases and ignores the controlling law.

The decisions identified by respondents, *id.* at 13, arise out of federal court litigation in a variety of contexts having nothing to do with the FAA. This Court, however, applies a different standard for "interlocutory" decisions from state courts. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482–83 (1975). Applying the *Cox* standard, this Court has held that an order by a state court refusing to compel arbitration under the FAA should be reviewed immediately. See *Southland*, 465 U.S. at 6. In *Southland*, the Court explained that "failure to accord immediate review" of a decision denying arbitration under the FAA "might 'seriously erode federal policy.'" *Id.* at 7. The Court ruled that "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat

the core purpose of a contract to arbitrate" under the FAA. *Id.* at 7–8; accord *Perry* v. *Thomas*, 482 U.S. 483, 489 n.7 (1987) (following *Southland*).

Here, too, review of the court of appeal's refusal to compel arbitration is necessary to ensure that KPMG's federal right to arbitrate is not "defeat[ed]." *Southland*, 460 U.S. at 7. If KPMG is denied its right to arbitrate now and prevails on the merits in the state-court proceedings, then its federal right to arbitrate will have been rendered meaningless. See *id.* Moreover, reversal of the Florida court of appeal's decision would preclude further litigation of the causes of action for which KPMG has a right to compel arbitration. See *id.* at 6. As in *Southland*, denial of immediate review would "'seriously erode federal policy'" under the FAA. *Id.*

II. THE DECISION BELOW SHOULD BE SUMMARILY REVERSED BECAUSE IT CONFLICTS WITH THIS COURT'S PRECEDENTS UNDER THE FAA.

The decision below should be summarily reversed because it conflicts with this Court's decisions in *Dean Witter* and *Arthur Andersen* and thus undermines the uniform application of the FAA in a high-profile proceeding involving claims that federal courts have sent to arbitration under the FAA.

1. Respondents confirm that there is no dispute about the controlling legal standard for compelling arbitration under the FAA: "If respondents' claims are derivative under Delaware law, they are subject to arbitration." Opp. 1. The court of appeal denied arbitration of all claims without addressing whether respondents' claims for malpractice and aiding and abetting a breach of fiduciary duty were derivative and thus subject to arbitration under the FAA. By

doing so, the court of appeal necessarily held that the FAA does not compel arbitration of these claims even if they are derivative. At a minimum, the court's ruling does violence to the bedrock principle that, under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

The court of appeal's decision directly conflicts with (1) *Dean Witter*'s holding that a court must compel arbitration of claims subject to a binding arbitration agreement even if other claims before the court are deemed nonarbitrable, 470 U.S. at 218–21; and (2) *Arthur Andersen*'s holding that a court may not disregard state law mandating the enforcement of arbitration agreements against nonparties, 129 S. Ct. at 1902 & n.5.

2. Respondents contend that there is no conflict with this Court's precedent because the court of appeal "found all of respondents' claims to be direct," Opp. 8, even though it did not "expressly discuss" respondents' malpractice and aiding-and-abetting claims, *id.* at 1. Nothing in the court of appeal's opinion or the record supports that assertion.

The court of appeal recognized that respondents advanced four distinct claims. Pet. App. 25a. The court also ruled that the arbitration agreement "would not apply to the direct claims made by the individual plaintiffs," *id.*, but nowhere concluded that that the malpractice and aiding-and-abetting claims were direct. In contrast, applying *Tooley* v. *Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), the court held that respondents' negligent-

misrepresentation and FDUTPA claims were direct because they "allege individual harm to the plaintiffs and involve torts directed at the individual limited partners." Pet. App. 26a. Having concluded that these two claims were direct and thus nonarbitrable, the court "affirm[ed] the trial court's denial of the motion to compel arbitration," *id.* at 27a, without ever addressing the malpractice and aiding-and-abetting claims.

Further, at oral argument, the court of appeal acknowledged that some claims might be deemed "direct" and others "derivative." Tr. Oral Ar. 20–21. The analysis in its ruling, however, was limited to "the claims of negligent misrepresentation and violation of FDUTPA." Pet. App. 26a. The court approvingly cited case law for the proposition that "the same set of facts may result in both direct and derivative claims," *id.* at 27a—a proposition that would have been irrelevant had the court concluded that all of respondents' claims were direct. Taken together, the court of appeal concluded either (1) that it was unnecessary to decide whether respondents' malpractice and aiding-and-abetting claims were direct, or (2) that these claims were derivative.

In fact, both claims are plainly derivative. Cf. Pet. 18 n.4. The malpractice claim depends on a showing that KPMG violated its duty to the Rye Funds to comply with professional standards in auditing their financial statements. Compl. ¶¶ 158–162. Likewise, the aiding-and-abetting claim depends on a showing that KPMG "knowingly perform[ed] an inadequate audit" of the Rye Funds' financial statements. *Id.* ¶ 186. For both claims, any injury to respondents is derivative of the injury to the Rye Funds. Indeed, one case cited by the court of appeal as support for its holding that negligent misrepresentation is a "direct"

claim ruled that a claim for aiding and abetting a fiduciary breach based on allegations similar to respondents' was "'a paradigmatic derivative claim.'" *Stephenson* v. *Citgo Grp. Ltd.*, 700 F. Supp. 2d 599, 610–11 (S.D.N.Y. 2010) (applying Delaware law).

3. To avoid these conclusions, respondents advance an argument that is contrary to the position they took below. In their response to KPMG's petition for rehearing, respondents stated that the court of appeal "held that at least two of Plaintiffs' claims are direct (and not arbitrable) and *was silent about whether any other claims are derivative*." Plaintiffs' Response to KPMG's Motion for Rehearing at 3 (emphasis added). Further, below, respondents defended the court's decision by arguing only that "th[e] Court correctly held that Plaintiffs' negligent misrepresentation and FDUTPA claims against KPMG are direct." *Id.* at 10. Nowhere did respondents suggest that the court of appeal had held that their malpractice and aiding-and-abetting claims were direct claims.

Respondents now assert that it is "unlikely" that the court disregarded this Court's precedents because respondents "at no point argued that the court of appeal should refuse to compel arbitration of their claims, even if they were derivative." Opp. 9, 10. That is not so. At oral argument, in response to a question whether there could be "some claims being heard in arbitration and some being heard in circuit court," respondents told the court that "as a practical matter if a claim is determined in our case to be derivative, it's never going to be pursued and there will be no arbitration." Tr. Oral Arg. 21–22.

Contrary to that representation, respondents have continued to force KPMG to litigate claims that the trial court previously had determined to be "deriva-

tive." Pet. 13. Moreover, the trial court has refused to compel arbitration of those claims because its prior order denying arbitration "'was affirmed'" by the court of appeal in the decision challenged here and KPMG's arguments under the FAA are "'nearly identical'" to those presented to the court of appeal. *Id.* As a result, KPMG has been forced to litigate claims that the trial court previously held were "derivative" even though respondents admit that any "derivative" claims "are subject to arbitration" under the FAA. Opp. 1.[1]

4. Contrary to respondents' contention, therefore, the issue here is not simply that the court of appeal did not "expressly discuss" respondents' malpractice and aiding-and-abetting claims—it treated them as irrelevant when it affirmed the trial court's order denying arbitration of those claims. That decision is irreconcilable with this Court's precedents.

As respondents acknowledge, *Dean Witter* and *Arthur Andersen* make clear that the claims must be sent to arbitration if they are derivative. *Id. Dean Witter* requires a court to determine whether *each* claim is nonarbitrable before denying arbitration as to that claim, because the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed," even if other claims before the court are nonarbitrable. 470 U.S. at 218. The court of appeal was therefore obligated to decide whether respondents' malpractice and aiding-and-

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[1] None of the six decisions respondents cite to argue that the Florida court of appeal "'rigorously enforce[s]'" arbitration agreements, Opp. 10–11, actually compelled arbitration under the FAA. *Cf. Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 449 (2006) (reversing Florida Supreme Court decision that refused to compel arbitration under the FAA).

abetting claims were derivative before it could deny arbitration of those claims.

Accordingly, KPMG's petition does not depend on "speculation about what the Florida court of appeal might have done," Opp. 2, but rather on what the court of appeal undeniably did—denied arbitration as to all claims without addressing whether two of the claims were derivative and thus subject to binding arbitration under the FAA. In doing so, the court denied KPMG its core right under the FAA to receive a determination as to whether respondents' malpractice and aiding-and-abetting claims are derivative and, if so, to be granted an order compelling arbitration of those claims. That was clear error. See *Howlett ex. rel. Howlett* v. *Rose*, 496 U.S. 356, 369 (1990) (a "state court may not deny a federal right"); *Testa* v. *Katt*, 330 U.S. 386, 394 (1947) ("State courts are not free to refuse enforcement of [a federal] claim").

For these reasons, the decision below cannot be reconciled with this Court's precedents under the FAA and should be summarily reversed. The law is settled, the material facts are not in dispute, and the decision below is clearly in error. See Eugene Gressman et al., *Supreme Court Practice* 350 (9th ed. 2007); cf. *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam) (summarily reversing lower court's misapplication of this Court's arbitration precedents); *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504 (2001) (per curiam) (same). Consistent with *Dean Witter* and *Arthur Andersen*, the Court should reverse the decision below and remand with instructions to determine whether respondents' malpractice and aiding-and-abetting claims are derivative, and if so, to compel arbitration of those claims.

5. Alternatively, the Court should grant plenary review. Contrary to respondents' contention, the issue before this Court is whether it was appropriate as a matter of federal law under the FAA for the court to refuse to compel arbitration of respondents' malpractice and aiding-and-abetting claims without deciding whether they were direct or derivative. As to that question, the decision below conflicts with numerous federal circuit court decisions holding that (1) the FAA requires courts to compel arbitration of arbitrable claims even if they are presented in a lawsuit that involves nonarbitrable claims, Pet. 18; and (2) the FAA requires courts to enforce arbitration agreements against nonparties when the contract is enforceable against them under traditional principles of state law, *id.* at 22–23.

This Court's review is necessary to restore uniformity among the lower courts as to these important and recurring issues under the FAA.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse the decision below, or alternatively, accept the case for plenary review.

Respectfully submitted,

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